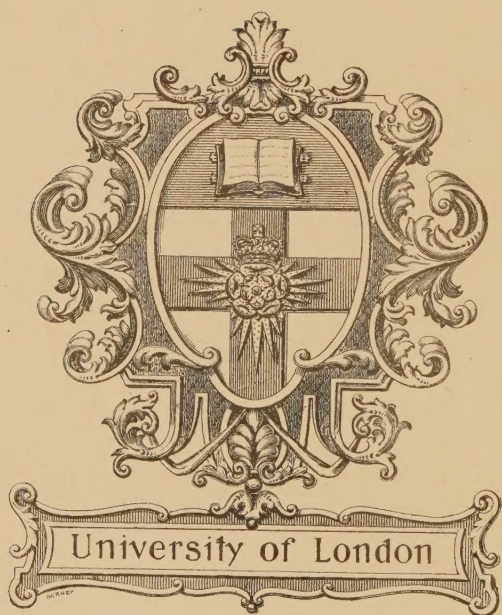


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THE
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ANNOTATED

OF CASES DECIDED IN

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ALL DIVISIONS OF THE SUPREME COURT
AND
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CORRIGENDA.

- p. 407. In the first paragraph of the headnote two lines from the end for "they could dispute the validity" read "they could not dispute the validity."
- p. 947. Line 6 from bottom. For *Cookney v. Dunbar* *v. Attenborough* as given in the list of cases referred to.
- p. 1067. Cases referred to. The Digest reference of *Re Mahmoud & Ispahani* is 12 Digest 27, 2220. The reference to *Young & Co. v. Royal Leamington Spa Corpn.* is (1883), 8 App. Cas. 517.
- p. 1438. For *E. Errington* read *F. H. L. Errington*.
- p. 1600. *Re Thornber*. *Longbothams & Bradley* acted for the widow and *Clarkson, Thomas & Collinson* for the trustees and the mother.

THE ALL ENGLAND LAW REPORTS ANNOTATED

EYRE v. BRUMFIELD

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parc and Goddard, JJ.), **April 21, 1936.**]

Gaming—Jurisdiction of justices to order destruction of gaming machines—Gaming Act, 1845 (c. 109), s. 8.

The appellant was convicted before petty sessions of unlawfully gaming with automatic machines, and a number of machines in his possession were ordered by the justices to be destroyed :—

HELD : the proceedings being taken under the Gaming Houses Act, 1854, the justices had no jurisdiction to order the destruction of the machines, such jurisdiction being conferred only by the Gaming Act, 1845, s. 8, and in cases brought before them by a warrant issued under that Act.

[EDITORIAL NOTE. The point here is that it is only under the Gaming Act, 1845, s. 8, that the destruction of gaming machines can be ordered and the proceedings must be brought before the justices by a warrant issued under the provisions of that Act.

FOR THE GAMING ACT, 1845, see HALSBURY, Hailsham Edn., Vol. 15, p. 500, para. 903 ; and FOR THE ACT, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 1146.]

APPEAL by way of case stated, from an order of the Grimsby Justices made under the Gaming Houses Act, 1854 ; on summonses issued under the Gaming Houses Act, 1854, s. 4, for the destruction of certain automatic gaming machines.

The appellant, George William Eyre, of Cleethorpes, was convicted on four summonses, of unlawfully gaming with automatic machines on various days in Aug., 1935. He was ordered to pay £27 7s. 6d. costs, and an order was made that 21 automatic machines in his possession should be destroyed. The machines cost about £200. On appellant's application, the justices stated a case for the opinion of the Divisional Court.

G. R. Swanwick, for the appellant : The only enactment conferring such power is the Gaming Act, 1845, s. 8. No charge was made under this Act, and no person was taken before the justices by virtue of a warrant.

Vernon Gattie, for the respondent (the prosecutor) : These proceedings were started by a warrant under the Gaming Act, 1845, and the premises were entered under that warrant. The proceedings before the justices were taken under the Gaming Houses Act, 1854, s. 4. It is not necessary that the defendant should be actually arrested provided he eventually comes before the court as a result of the issue of the warrant.

LORD HEWART, L.C.J. : This appeal ought to be allowed. Though there appears to have been some misconception, it is clear, that the proceedings against the appellant are based upon an information laid under the Gaming Houses Act, 1854, s. 4, and not otherwise. The justices, having heard the evidence, ordered amongst other things that 21 automatic machines produced by the respondent should be destroyed. The only power that the justices have to order destruction of gaming instruments is to be found in the Gaming Act, 1845, s. 8, and that power is given in these terms :

It shall be lawful for the police magistrate or justices before whom any person shall be taken by virtue of the warrant or order to direct all such tables and instruments of gaming to be forthwith destroyed.

What is the warrant or order ? It is the warrant referred to in another part of that section. It means the warrant issued under the provisions of that Act, and it is the warrant under which the premises have been entered. The appellant was not taken before the justices by virtue of a warrant issued under the provisions of the Gaming Act, 1845. On the contrary, he appeared in response to summonses based upon an information under the Gaming Houses Act, 1854, s. 4. It seems to me clear, therefore, that the contention made on the part of the appellant was right. The justices had no power to confiscate or to order the destruction of the machines which were produced to them. There was no charge under the Gaming Act, 1845, before these justices, and therefore the justices in the circumstances and in law, were not entitled to order the destruction of these machines. The proper course will be to remit the matter to them with the expression of opinion that, in view of the nature of the proceedings before them, they had no power to order the confiscation or the destruction of these machines.

DU PARCQ, J. : I agree.

GODDARD, J. : I agree.

Appeal allowed with costs.

Solicitors : *Godfrey Warr & Co.*, agents for *John Barker*, Grimsby (for the appellant); *Mott & Parkes*, agents for *H. K. & H. S. Bloomer*, Grimsby (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

RODENHURST ESTATES, LTD. v. W. H. BARNES, LTD.

[COURT OF APPEAL (Sir Boyd Merriman, P., Scott, L.J., and Eve, J.),
April 21, 1936.]

Landlord and Tenant—Covenant against assignment—Licence granted by Landlord—No legal assignment—Entry upon premises—Action for rent—Estoppel.

The lease of certain property which the tenant used in connection with his business, contained a covenant against assigning without the landlords' consent. The tenant assigned his business to a limited company, agreeing to transfer to them all existing leases. A licence to assign the lease of the property was duly granted by the landlords, and the company went into possession and for a time paid the rent to the landlords. No assignment of the lease was in fact completed. In an action against the company for the recovery of rent, the company contended that, being mere equitable assignees of the lease, there was no privity of contract between it and the landlords and it was not liable for the payment of the rent. The county court judge held that inasmuch as the landlords' consent was to the company being in possession of the premises as assignees and not otherwise, the company was on the facts estopped from denying that it was an assignee and liable for the rent. The company appealed:—

HELD: there was evidence upon which the county court judge could rightly hold that the company was so estopped.

[EDITORIAL NOTE.] Generally speaking an equitable assignee does not render himself liable to be directly sued upon the covenants in the lease. There is, however, a distinction between the cases where an equitable assignment is taken for the express purpose of avoiding liability on the covenants and a case, like the present, where the intention clearly was that the assignee was to assume, and did, in fact, assume that liability. The landlord having been approached, and having granted, a licence to assign was a further reason why it should be held that the assignee was estopped from denying that he was a legal assignee.

AS TO LIABILITY AS ASSIGNEE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 360, 361, para. 435; and FOR CASES, see DIGEST, Vol. 31, p. 406, Nos. 5521-5524.]

Cases referred to :

- (1) *West v. Dobb* (1870), L.R. 5 Q.B. 460; 31 Digest 371, 5187.
- (2) *Stratford-upon-Avon Corporation v. Parker*, [1914] 2 K.B. 562; 31 Digest 406, 5524.
- (3) *Carr v. London & North Western Railway Co.* (1875), L.R. 10 C.P. 307; 21 Digest 288, 1020.
- (4) *Tichborne v. Weir* (1892), 67 L.T. 735; 31 Digest 403, 5494.
- (5) *Stait v. Fenner*, *Fenner v. McNab*, [1912] 2 Ch. 504; 31 Digest 419, 5650.
- (6) *Purchase v. Lichfield Brewery Co.*, [1915] 1 K.B. 184; 31 Digest 408, 5539.
- (7) *Williams v. Heales* (1874), L.R. 9 C.P. 177; 31 Digest 406, 5523.

APPEAL from a judgment given by His Honour JUDGE BENSLEY WELLS in the Southwark County Court on Nov. 18, 1935.

The respondents, the plaintiffs in the action, were landlords of a shop. In Dec., 1928, they let the shop to William Henry Barnes, a piano-dealer. In July, 1930, Mr. Barnes turned his business into a private limited company (the defendants and appellants), of which he and his family

became directors. On Oct. 21, 1930, the landlords granted to Mr. Barnes a licence to assign his lease of the shop to the company, which entered into possession on the date of its formation. No legal assignment was ever executed, but the company paid the rent regularly every quarter to the landlords in response to printed applications. Mr. Barnes died in Sept. 1931. The company continued to pay rent until Apr. 1, 1935, and vacated the premises on June 24, 1935, although the term had not expired. After correspondence the landlords sued the company in the county court for £41 10s. 0d., one quarter's rent and fire insurance. The company denied that the term had ever become vested in it and maintained that therefore it was not liable to pay rent to the landlords. At the hearing the company admitted that it was the equitable assignee of Mr. Barnes. The learned county court judge, held that the conduct of the company was consistent only with its being a legal assignee; that by giving Barnes licence to assign the landlords agreed to the company being in possession as assignee and not otherwise; and that the company was estopped from denying as against the landlords that it was a legal assignee. The company appealed.

F. R. Evershed, K.C., and *J. F. Bowyer* for the appellant company.

John Morris, K.C., and *H. Salter Nichols* for the respondents.

Evershed, K.C.: There is no estoppel, because the company made no representation, either by act or word, that it was the legal assignee of the term. On the authorities, the licence to assign was sufficient and carried with it a licence to go into possession without a legal assignment; the acts of the company—namely, taking possession and paying rent direct to the landlord on receipt of demand notes—were not sufficient to constitute a representation that it was a legal assignee of the term. [He referred to *West v. Dobb* (1); *Tichborne v. Weir* (4); *Stait v. Fenner* (5); *Stratford-upon-Avon Corporation v. Parker* (2); *Purchase v. Lichfield Brewery Company* (6), and distinguished *Williams v. Heales* (7).]

Bowyer following on the same side: The judgment in *West v. Dobb* (1) states that it is common practice to let the purchaser into possession before the legal estate is transferred. It is, therefore, not reasonable for a landlord to assume, in circumstances such as these, that a legal assignment is to be executed. The licence was granted with the knowledge that it was a common practice for an assignee to enter into possession without a legal assignment and therefore to be left in the position of an equitable assignee.

Morris, K.C.: The learned county court judge decided that there was an estoppel and also an attornment. The appellant company made a representation of fact that it had a legal estate and had taken a legal assignment. That representation rests upon the following circumstances, all of which were consistent with the appellants' possession of the legal estate: they went into possession, paid the rent on their own account,

and put up their name over the shop, which they could only do as legal assignees, under the terms of the lease. There is no authority in *West v. Dobb* (1) for the proposition that a licence to assign gives permission to the intending assignee to remain in possession for ever without taking a legal assignment. The landlords' position was changed because: (1) they were induced to take no action of ejectment on the ground that Barnes had parted with possession to a person not a legal assignee or that a name was displayed on the premises in breach of the lease; (2) Barnes removed his goods from the premises; and (3) they did not withdraw their licence, believing that a legal assignment had been executed.

SIR BOYD MERRIMAN, P.: This is an appeal from His Honour JUDGE BENSLEY WELLS, who has given judgment against the appellants, Messrs. W. H. Barnes, Ltd., for the rent of certain premises at 113A, High Street, Clapham. The premises were not let by the respondents, the Rodenhurst Estates, Ltd., to this company, but were let on Dec. 31, 1928, for a term of fourteen years to the company's predecessor, Mr. W. H. Barnes. The lease contained a covenant against assigning, under-letting or parting with possession without the consent of the landlord, such consent not to be unreasonably withheld in the case of a responsible assignee. I am not quoting the exact words but that is the substance of it. In 1930, Mr. Barnes, who was a dealer in pianos, made over his business to the appellant company, W. H. Barnes, Ltd., of which he was the governing director and in which, I gather, he and his family were the shareholders. It was an extensive business, with a good many premises for the sale of pianos, including this particular shop in High Street, Clapham; and as between himself and the company it is not disputed—indeed, it is common ground—that there was a complete assignment of the whole business as a going concern, including an agreement to transfer all existing leases.

In pursuance of that arrangement between Mr. Barnes and the company which bore his name, the solicitors (who were at the time the solicitors for Mr. Barnes and are now the solicitors for the company) wrote on Oct. 14, 1930, a letter to the solicitors for the respondent company in the following terms:

The lease of the above premises is now vested in Mr. William Henry Barnes. He has recently converted his business into a private limited liability company and wishes to obtain the licence of your clients for him to assign the above lease to the company.

The letter then gives the title of the proposed company, the registered office, the amount of share capital and the denominations of the same, and the statement that Mr. Barnes was the governing director of the company, and asks whether the licence will be granted.

It is not necessary to follow that transaction out in detail, but the landlord company agreed to grant that licence and accordingly on Oct. 21,

a week later than the letter, the landlord company sent a form of licence whereby they consented to William Henry Barnes assigning the premises specified to W. H. Barnes, Ltd., whose registered office was at such and such an address, and it was added that this consent did not authorise any further or other assigning or under-letting of the premises or any part thereof.

Now in point of fact no assignment was ever completed. It is not disputed that as between Barnes—or his estate, for he is now dead—and the company, at any moment the company had a right to compel the completion of an assignment. There was quite clearly a binding contract for that amongst other things, and at any moment execution of that could have been compelled; the company, if necessary, could have sued for specific performance. In fact, however, it was never done, and the legal position, therefore, is that the company were at the material time merely equitable assignees of this particular lease, but they entered into possession and put or retained—retained in the first instance and subsequently put—upon the premises pianos and stock which belonged, not to Mr. W. H. Barnes, who had ceased to own any of the pianos and other stock-in-trade, but to the company. The company put up its name over the premises, and the company paid rent with its own cheques to the lessor company. It is quite true that they had *de facto* taken over possession before the permission to assign was accorded. Personally, I think that makes no difference whatever. I think this case falls to be decided upon the licence to assign and the facts which followed upon that. Speaking for myself, I cannot see that it makes any difference that in fact, in anticipation of the granting of the licence, they had already entered into possession.

This is an action for rent, and it is an indisputable proposition—nor has anybody either here or below attempted to dispute it—that a mere equitable assignee as such who has entered into possession and paid rent is not thereby rendered liable upon the covenants of the lease or, amongst other things, for the payment of the rent. No privity of estate is created between himself and the landlord by those facts, and if that were all there was to be said about this case the plaintiffs' claim would obviously not be maintainable. But the case presented to the learned county court judge and accepted by him was that these people, though equitable assignees, were estopped in all the circumstances of the case from saying that they were not the legal assignees, that they had not obtained a legal assignment, and that rent was not recoverable against them upon that basis.

We have been given the authorities which have laid down the principle that the mere fact that an equitable assignee goes into possession and pays rent does not create any privity of estate and does not render him liable upon the covenants. As one might suppose, most of those cases

were cases of a mortgagee who, in order to preserve his security and on the assumption that his mortgagor is unable to keep up the mortgage interest and by the same circumstances is probably also unable to pay the rent, enters into possession in order to save the loss of his money. In those circumstances it is obvious that there can be no reason why privity of estate should be created between such an assignee and the landlord ; nor is there any sort of reason why mere lapse of time, mere receipt of rent from an equitable assignee, should in those circumstances create any presumption that he becomes anything other than that which he was at the moment of entering—namely, a person who was there simply to protect his security. It is incidental to the preservation of his security that he should continue to pay the rent, for otherwise he would lose the property which he wishes to maintain as the security for his loan. What is said here by way of complaint against the learned county court judge's judgment is this : that this company, W. H. Barnes, Ltd., were nothing but equitable assignees who had entered into possession and had paid rent ; that there was nothing whatever to distinguish their position from that of the mortgagee who has entered into possession save one fact, that they entered into possession by virtue of this licence to assign ; and it is said that the county court judge has wrongly interpreted the effect of the licence to assign : that he must have held that the only possible inference from their entering under a licence to assign was that an assignment had actually been completed, whereas there is authority in *West v. Dobb* (1) to show that that is not necessarily the effect of such conduct at all. Before considering that case I should like to refer in his own words to what the county court judge actually has found. At the end of his " Notes as to Judgment," written, of course, after he had given judgment, he says :

In my view, by giving Mr. W. H. Barnes licence to assign to defendants, plaintiffs agreed to defendants being in possession of the premises *as assignees* and not otherwise. I was of opinion that on the facts of this case, as to which there is no dispute, defendants ought to be held to be estopped from denying, as against the plaintiffs, that they were assignees of the lease in question : and I so held.

That is the finding which is challenged. I have read the licence to assign and, speaking for myself, I think that the effect of it is as the learned county court judge indicates. I think that, though they could have asked for a licence merely to part with possession or for a licence to under-let, they did in fact ask for a licence to assign and it was that which was granted, and I think that means that licence was given to part with possession on the footing that in due course a legal assignment would be executed. I say " in due course " because the case of *West v. Dobb* (1) shows plainly that there is, as I should imagine must be universally acknowledged, a common practice of allowing people to take possession in advance of the actual execution of the assignment. From

certain passages in the judgments in that case, however, it has been argued that, because possession may be taken as a matter of practice under a licence to assign before the execution of the assignment, and may be so taken as a matter of law without causing a forfeiture under the covenant, therefore the case is authority for the proposition that the granting of a licence creates for all time, for all the remaining unexpired term of the lease, a right on the part of the potential or proposed assignee to remain in possession as equitable assignee with no obligations towards the landlord at all, and with no obligation on his part to execute an assignment. Now I do not in the least agree that that is the result of that case, and I do not think that that is the law. I think that the law is that when a man gives a licence to assign, assuming for the sake of argument that that imports as of right (as I am not prepared to admit) a licence to go in in advance of the assignment, at the very most it means this: that he may go in in advance of the formal execution of the assignment upon the condition that within a reasonable time an assignment is executed. I think myself that the strict view of the law is this: that when a licence to assign is asked for and granted, strictly speaking possession may not be taken until that assignment has been executed; but it is not necessary to decide that point.

What I am quite satisfied of is this, that the case of *West v. Dobb* (1) comes nowhere near the proposition for which it is cited as an authority. The point in that case was this. In the plainest possible way the landlord himself had written—the precise terms do not matter—to the proposed assignee in the first instance a letter telling him that he might take an assignment, and it is true that without anything more formal than that the assignee went into possession. He remained in possession for some time—two years, I think—and then, again with the landlord's written consent, assigned to third parties. In due course of time, and after the lapse of a considerable time, the landlord tried to say that by entering into possession without a legal assignment on one or other or both of these occasions a forfeiture had been operated. It is not surprising that the Court of Queen's Bench, affirmed as they were on appeal, would have nothing whatever to say to that proposition. In effect, without quoting passages at length, what they said was this: "You, the landlord, wrote to this man, the original assignee, and said 'You may take possession.' You wrote again later and said that he might transfer possession to these other people—might have an assignment. If you meant to say by that—having regard to the known practice of people going in by leave and licence without any formal assignment having actually been executed but in anticipation of the execution of the assignment—that no one was to enter those premises unless and until a formal assignment had been executed, you should have said so, and we are not going to let you set up that a forfeiture has been incurred by

the absence of a more formal document than those which you yourself wrote." That is the substance of it. I think, myself, that implicit in that opinion is the fact that the court really thought that in law there was no right to enter until the formal assignment was executed ; but it was not necessary to settle that question, nor was it necessary to decide whether the landlord was estopped from saying that there had not been a legal assignment. There are nevertheless, plain indications in the judgment that if it had been necessary the court would not have hesitated so to find. In fact, there are passages in the judgment which I think mean that the court thought there was an estoppel. They decided the case, however, on the sole point that, as it was not, owing to the habits of mankind, an unnatural thing that possession should be taken in advance of the assignment, a man who wrote letters like that was not to be allowed to say that a forfeiture was incurred by reason of the entry into possession before the execution of the formal document.

Now, I think, that that case goes nowhere near justifying the proposition that, once a licence to assign has been granted, that is a licence to take possession at all events, regardless of whether an assignment is subsequently executed or not, and that it enables the intended assignee to sit there for the remainder of the term without any liability. That seems to me, with great respect to those who put it forward, to be sheer nonsense. Now unless that is right, the appellant in effect admits that it is impossible to say that the learned county court judge was wrong. Perhaps it is enough to say—because, after all, this is an appeal from a county court—that if there was evidence upon which this estoppel could fairly be found, then it is not for us to re-try the case. But I think there was ample evidence on which this estoppel could be found. I do not think that this case is, as Mr. Evershed and Mr. Bowyer have insisted, merely a case of an equitable assignee who has paid rent and entered into possession. If it were that, as I have said, there would be nothing to talk about. I think it is a great deal more than that, and I think that the county court judge has come to a correct conclusion in saying that the consent was to the company being in possession of the premises as assignees and not otherwise, and that on the facts of this case the proper inference was that they were estopped from denying that they were assignees—that is to say, that a legal assignment had been executed.

Mr. Morris has summarised, with perfect accuracy, the circumstances on which the county court judge was entitled to rely as being something a great deal more than mere entry into possession and mere payment of rent. He relies in the first instance on the latter which I have already read, which, though it did not, of course, give all the details of the assignment of the business from Barnes to his company, gave quite sufficient information that it was a sale of a business lock, stock and barrel as a going concern. It would, I think, not require much intelligence on

the part of the solicitors to whom this letter was written to infer that, when licence to assign the leasehold premises was asked for, amongst the things transferred by Mr. Barnes to the company were the leasehold properties. At any rate, that is the starting-point, and I agree entirely with Mr. Morris that that alone at the outset differentiates the case from that of the mere equitable assignee, such as the mortgagee who is going to protect his security. You start with the assumption that what was intended was a legal assignment as part of a much bigger transaction for the sale of a whole business to a company with a capital of £200,000, a divesting by Barnes of all his interest and a vesting in the company as a going concern of all these piano-shops, stock-in-trade, and all the rest of it. That is how the story starts, and that is followed up by the granting of the licence itself in those terms—and, in fact—though the details were not known—by the transfer of the business to the company as a going concern.

It is in those circumstances that the company thereafter paid the rent, and quite plainly paid it, not as agents for W. H. Barnes—who for all practical purposes had ceased to exist—as before this action occurred he had in fact ceased to exist—but on their own account. Moreover, they put up over these premises their own name. It is quite true that this particular set of premises was not the registered office of the company, but they put up their name over the premises. Although I do not attach very much importance to the point, Mr. Morris has made it, and I think that for what it is worth it is a legitimate point: that unless they were the lessees—that is to say, the legal assignees of the original lessor—they would have no right without breaking the covenant in the lease to put up that sign over the premises. From those circumstances Mr. Morris says, not that the only inference, but that the only legitimate, the only sensible inference to be drawn is that the proposed assignment had in fact been executed and that everybody was acting upon that basis; that being so, he says, it is enough for this purpose to say that the company must be held to that representation, a representation of an existing fact. It is not necessary to go back to consider whether the mere intention to assign, a statement of the existing intention to assign, would of itself be enough to make a representation of fact. That is part of the early history. Mr. Morris argues, and I think rightly, that by the time they had entered into possession and continued quarter after quarter to pay the rent, the company must have intended to be representing that they were doing that because a legal assignment, as was contemplated, had in fact been executed.

Mr. Evershed has relied on the case of *Stratford-upon-Avon Corporation v. Parker* (2), in support of his proposition that mere possession and payment of rent do not of themselves create liability. That case, which was a case of an executor *de son tort*, was a case where it was

common ground, and the judges so stated, that it was impossible to hold that there was any estoppel barring the defendant from denying that he was an assignee of the term ; but on p. 566 and at the top of p. 567, LUSH, J., indicates conversely the sort of facts upon which, if they had existed, he obviously would have been prepared to find that there was an estoppel. Dealing with the alternative of estoppel, he says this :

It is perfectly plain from the correspondence that he never paid the ground rent in his own name, and that he did nothing in the nature of attorning to the plaintiffs as their tenant or assert expressly or impliedly to them that he was. The plaintiffs never received any ground rent from the defendant on the footing that he was their tenant ; on the contrary, they took the ground rent on the footing that it came from the mother, and as soon as they ascertained that it did not come from her and that she was dead, they acted upon the suggestion made by the defendant and took possession at once.

Although he added :

The plaintiffs never having altered their position and the defendant never having acted upon the footing that he was their tenant, there can be no estoppel.

In this case it is perfectly plain from the correspondence and the facts that the defendants did pay the rent and paid it in their own name, and that they did a good deal in the nature of attorning to the plaintiffs as their tenants, and certainly asserted impliedly, if not expressly, that they were the lessors' tenants. Moreover, the landlords, I am quite satisfied, received the rent from them on the footing that the company was their tenant. There only remains, therefore, the question whether the landlords altered their position on the footing of those representations, express or implied. Now I think there is no doubt about that. The suggested alteration of position in the court below was that, on the basis that these people were in illegal possession, the landlords were entitled to ejectment, and by these representations were lulled into refraining from taking any steps. I think that there is a good deal to be said for that view. Another suggestion which Mr. Morris made was that in like fashion the landlords were lulled into refraining from taking any steps to say that the licence, not having been acted upon, was revocable or had lapsed. I am not sure that that is not really saying the same thing in another way, though the technical form of action would not be ejectment. But on the whole I prefer—not only because I suggested it myself—another more obvious detriment : change of position. On the faith of this licence to assign, and in due course in the belief that it had been perfected, the lessor company suffered a complete change of position. They allowed—figuratively speaking—Mr. Barnes to take all his goods off the premises and the company to put their goods upon the premises, on the basis (if Mr. Evershed's argument is correct) that they had no

right of recourse against the company's goods, because the company were not responsible for the rent but were merely equitable assignees. They allowed the one person who was responsible to them, Mr. Barnes, to take all his pianos, all his stock-in-trade and all the rest of it off the premises, and they had nothing upon which they could distrain for the rent. I think it cannot be disputed that if that was done in reliance upon this representation, that is quite plainly a change of position for the worse on the part of the lessors, and I think that there is abundant material here on which an estoppel can legitimately be inferred. I should infer it myself, but it does not matter whether I should or not ; it is enough that I say that there was abundant evidence upon which the county court judge could draw the inference which he has drawn. In my opinion this appeal must be dismissed.

SCOTT, L.J. : I agree ; and after the very careful analysis of both the facts and the law by the learned President, I only propose to add a few sentences. To my mind none of the cases prevents the application here of the ordinary principles of the law of estoppel. It is quite clear that an equitable assignee does not become privy to the estate as between himself and the lessor of the lease, and, consequently, a lessor cannot sue an equitable assignee as such for either the rent or breach of covenant. Where, however, the equitable assignee leads the lessor to understand quite definitely that he, the equitable assignee, is more than an equitable assignee and has the term as a legal assignee, then, if the landlord acts upon that representation in such a way as to alter his position, you have every constituent of a common law estoppel. In this case the particular form of estoppel that is applicable is described in the third paragraph of the propositions of BRETT, J., in *Carr v. London & North Western Railway Co.* (3) at p. 317 :

If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

Consider the facts of this case in order to answer the question, " Did the defendant company by their conduct make such a representation to the plaintiffs, the lessors under the original lease ? " First of all, look at the lease itself. It was a lease for a term of years to the individual, Mr. W. H. Barnes, the word " lessee " being defined as including assigns. By clause 13 the lessee covenanted not to assign, underlet, transfer or part with the possession of the demised premises or any part thereof or the lease without the previous consent in writing of the lessors, on condition that :

such consent shall not be unreasonably or arbitrarily withheld if the proposed assignee or under-lessee shall be a respectable and responsible person.

I am not sure that it is necessary for the purpose of my judgment, but I read that clause as providing that the consent shall not be unreasonably withheld in the case of a request for leave to assign or leave to underlet, and not as applying to the prohibition on parting with possession. That being the position under the lease, the lessee wrote a letter asking for leave to assign—not to part with possession, but for leave to assign—in the terms of the letter of Oct. 14, 1930, which my Lord has already read. Now that letter, to business people, clearly meant; I have arranged to transfer to a limited company, whose name and particulars I give you, my business, all the assets connected with the business, including the lease of the premises that I have from you, and my intention is to act upon your licence and make them the legal assignees of the lease so as to bring them in direct privity of estate with you. The licence was duly granted by the plaintiffs, paid for by Barnes, and then what happened? In fact, from a date slightly anterior to the grant of the actual licence, a few days before, W. H. Barnes, Ltd., apparently on their own motion, sent a cheque for the rent, because, under the agreement between them and Mr. Barnes, no doubt, they were to be liable for that rent. From that moment onwards they, and they only, paid the rent, and they paid it in their own interest, because they were occupying the premises for the purposes of their business. In addition to that the plaintiffs, the landlords, sent the demand for rent to them and treated them, as far as it is possible to do so by external *indicia*, as being their tenants—their lessees of the term. They allowed the name of the company to be put up, which, according to clause 14 of the lease, would have been an unauthorised act by the company unless they were assigns. If they were assigns—that is to say, legal assigns—it was an authorised act. In those circumstances it cannot be said that there was any doubt at all as to the footing upon which the payments of rent were made. I can see no external conduct of which the company could be capable if they were legal assigns, having got the assignment, which would make their position more obviously that of assigns than what they did in fact. They did, as it seems to me, everything that they could do to show to the landlords that they and they only were the owners of the term, and that consequently they were the tenants under the lease of the landlords.

Now in those circumstances, in what way did the landlords alter their position? As it seems to me, the licence which they originally gave was on its fair interpretation a licence to assign and nothing else, and I can see no ground at all for interpreting that licence as a licence to give possession except as an incident of the company becoming legal assigns according to the terms of the lease. The fact that in a case on different facts, in different language, it was thought that a common practice of applying a licence to assign loosely and allowing a proposed assign to

take possession before the legal licence was executed might be treated in that particular case as having been assented to by the landlord, does not in my view constitute what was said there in any sense an authority for the interpretation of this licence. Therefore I either interpret the licence as meaning that there was no right to transfer possession at all, having regard to the terms of the covenant—and that is, I think, the right interpretation—or, if there was, then I say that that instrument must *ex necessitate*, on ordinary principles of the law, have contained an implied term that it only allowed the transfer of possession before the grant of the assignment temporarily and pending the execution of the assignment, and on condition that the intention to grant the assignment was not abandoned but was in due course to be implemented, with the corollary that if the assignment was not made the licence would expire of its own terms, *sui termini*, because it was said by implication that it was so to expire. Once it had expired, in my view the landlords would have had several remedies open to them, in order that they might have the protection of the persons in occupation of the premises being privy to the estate and being liable under the obligations of the lease. By their being kept in the dark as to what the true position was, their rights were prejudiced, and the other part of the doctrine of estoppel is therefore satisfied on the facts of this case.

On those facts I am quite clear that the defendants are estopped from denying that they were the legal assigns of the lease and had the term. It is not perhaps irrelevant to add that the possession of the lease itself had no doubt passed under the business transfer from Mr. Barnes to the company and was in their physical possession at the time. For these reasons I agree that the learned judge's conclusion from the evidence before him was right and *a fortiori* that there was evidence to support it, which would prevent our disagreeing with him.

EVE, J. : I also agree. The case of the plaintiffs is that they are entitled to recover from the defendants the rent of these premises on the footing that the defendants were there as assignees of the term and not merely as owners of an equitable interest therein and as such not liable to pay the rent. The plaintiffs' case is put forward upon two sets of allegations. It is first alleged that the transactions which begin with the lease of 1928 and culminate with the granting of the licence to assign in 1930 operated—using the language of the particulars—to constitute the defendants as holding a legal and not merely an equitable interest. The plaintiffs alleged that that was the effect brought about by the licence which was granted, coupled with the possession which was given by Mr. Barnes. The defendants say that the interest was purely equitable, and the first question which is raised is whether or no the court below was justified in holding that the interest was a legal and not an equitable one. The learned judge, in his judgment, says : " In my

view, by giving Mr. W. H. Barnes licence to assign to defendants, plaintiffs agreed to defendants being in possession of the premises *as assignees* and not otherwise." As I understand it, the judge decides that point in favour of the plaintiffs.

Then comes the second point on which the plaintiffs rely, which is an alternative plea—that is, an alternative to the suggestion that the possession of the defendants was legal and not equitable. They allege that if the defendants did not become assignees of the said term as a legal term, then after the giving of the licence the defendants entered into and still remained in possession, and by their conduct—it comes to that—they are estopped from now denying that that was the position. The learned county court judge has dealt also with that plea. He expresses the opinion that, on the undisputed facts of the case, the defendants ought to be held to be estopped from denying as against the plaintiffs that they were assignees of the lease in question; and that is so held. That seems to me to be consistent with the evidence which we have heard and the arguments to which I, for one, have listened with great pleasure. In my opinion the appeal fails.

Appeal dismissed with costs.

Solicitors: *W. R. Millar & Sons* (for the appellants); *Crowther & Gray* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL v. CAMBRIDGESHIRE COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), April 21, 1936.]

Lunatics—Mental deficiency—Determination of residence—Mental Deficiency Act, 1913 (c. 28), s. 44.

A mental defective found guilty before justices of an offence was ordered to be placed in a certified institution. The offence was committed in Cambridgeshire. He had lived in London until he was eighteen and thereafter had wandered about the country, being employed and living in different places:—

HELD: the local authority responsible for his care was the Cambridgeshire County Council, the presumption under Mental Deficiency Act, 1913, s. 44 (1), being that the defective resided where the offence was committed. This was not a case of doubt within sect. 44 (4).

[EDITORIAL NOTE. The Mental Deficiency Act, 1913, s. 44 (4) provides that where the residence of the defective is in doubt, he shall be deemed to reside in the county or county borough of his poor law settlement. This subsection must be construed with subsect. (1) of the same section under which he is presumed to have resided where the offence was committed unless it is proved that he resided elsewhere. The latter subsection is in the nature of a paramount enactment and

unless it is proved that the defective resided elsewhere, the liability falls upon the county where the offence was or was alleged to have been committed. There must be definite evidence that he resided elsewhere before subsect. (4) can be referred to. Upon the facts this case may be usefully compared with *Kent County Council v. London County Council* (1915), 84 L.J.K.B. 1781; 33 Digest 272, 1901.

FOR THE LAW AS TO MENTAL DEFECTIVES, see HALSBURY, 1st Edn. Supplement to Vol. 19, para. 1024; and FOR CASES, see DIGEST, Vol. 33, pp. 272, 273, Nos. 1901, 1902; and FOR THE MENTAL DEFICIENCY ACT, 1913, s. 44, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 186.]

Cases referred to :

- (1) *Berkshire County Council v. Reading Borough Council*, [1921] 2 K.B. 787; 33 Digest 273, 1902.
- (2) *Kent County Council v. London County Council* (1915), 84 L.J.K.B. 1781; 33 Digest 272, 1901.
- (3) *London County Council v. Wiltshire County Council* (1927), 91 J.P. 122; Digest Supp.
- (4) *Stoke-on-Trent Borough Council v. Cheshire County Council*, [1915] 3 K.B. 699; 19 Digest 577, 135.

APPEAL by way of case stated, under sect. 44 (3) of the Mental Deficiency Act, 1913, against a decision of the Justices for the Borough of Cambridge.

In June, 1935, the justices found D. guilty of an offence committed in Cambridgeshire and ordered him to be sent to a certified institution for mental defectives, finding that under the Mental Deficiency Act, 1913, s. 44 (1) the London County Council were responsible for providing accommodation. D. had lived in London until he was eighteen, and thereafter he had wandered about the country. The London County Council appealed.

Vernon Gattie, for the appellants : Liability to provide accommodation should be placed upon the Cambridgeshire County Council. Sect. 44 (1) is *prima facie* applicable in such a case as this. [He referred to *Berkshire County Council v. Reading Borough Council* (1); *Kent County Council v. London County Council* (2); *London County Council v. Wiltshire County Council* (3)].

Arthur Capewell, for the respondents : The justices have found that the man did not live in London but also that he had employment at different places and lived in different parts of the country. The case is one of doubt and it is only possible to deal with it under sect. 44 (4). [He referred to *Berkshire County Council v. Reading Borough Council* (1) and *Stoke-on-Trent Borough Council v. Cheshire County Council* (4).]

LORD HEWART, L.C.J. : I am clearly of opinion that this appeal ought to succeed. The words of the Mental Deficiency Act, 1913, s. 44(1) apply to the case. The subsection provides :

Where the order is made in respect of a person found guilty of an offence, that person shall for the purposes of the provisions of the last preceding section be pre-

sumed to have resided in the place where the offence was or was alleged to have been committed, unless it is proved that he resided in some other place.

No words could be plainer to show that, for the purpose of ascertaining which local authority should be responsible for the accommodation of the person convicted, the presumption applies unless it is proved that he resided in some other place. Here there was undoubtedly an attempt to prove that the person did reside in some other place, but at the conclusion of the whole matter there was no proof that he resided at some place other than the place where the offence was committed. By sect. 44 (1) he is presumed to have resided in the place where the offence was committed. The difficulty, it has been suggested, is as to the application of subsect. (4). But, as has been pointed out by AVORY, J., in the case of *Berkshire County Council v. Reading Borough Council* (1), at p. 795 :

It appears to me that until and unless a doubt arises as to where a person resides, no question of poor law settlement has to be considered at all. It is only to be considered where there is a doubt as to where the person in question resides in the ordinary sense of the term, without any technical meaning attached to the word.

It is conceivable that the terms of subsect (4) may refer to a case that would otherwise come within subsect. (1), but in this case it does not seem to me to be possible. The offence was proved, and it was not proved that D. did reside in some other place. Therefore the decision of the justices was wrong in point of law and the order ought to have been made as in the *Berkshire* case (1), and the contention of the appellants in respect of this appeal should be allowed.

DU PARCQ, J. : I agree.

GODDARD, J. : I agree.

Appeal allowed with costs.

Solicitors : *J. R. Howard Roberts* (for the appellants) ; *A. Tabrum*, Cambridge (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

STARKEY v. HALL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), April 21, 1936.]

Insurance—Third-party risks—Certificate of Insurance—Delivery—Production—Road Traffic Act, 1930 (c. 43), ss. 36, 40.

A policy of insurance in respect of a motor car was prepared for and signed by S., the premium being paid by M. F., Ltd., who by agreement were to be repaid by S. in instalments. Until the premium had been repaid in full M. F., Ltd., were to retain the policy and the certificate, which were delivered to them by the insurers. S. never saw the certificate. When driving the motor car S. was stopped and requested to produce his certificate of insurance. M. F., Ltd., produced the certificate within five days. Upon an information preferred against S. for unlawfully using a car without having in force in relation thereto a policy of insurance, the justices held that the certificate had not been delivered within Road Traffic Act, 1930, s. 36 (5) to S., whom the justices held to be the person by whom the policy had been effected, and they convicted S. On appeal, S. pleaded that the delivery of the certificate to a person designated by the insured was sufficient compliance within sect. 36 (5) and alternatively that M. F., Ltd., were the persons by whom the policy was effected and delivery to them was a sufficient compliance with that section :—

HELD : (i) inasmuch as there was no evidence that M. F., Ltd., had received the certificate as agents for S., it could not be said that the certificate had been delivered to S.

(ii) the policy was effected by S., and not by M. F., Ltd., and there was, therefore, no delivery to the person by whom the policy was effected within sect. 36 (5).

EDITORIAL NOTE. In this case a policy covering third-party risks was effected by the car owner, but the premium was paid by a company, who were to be repaid by instalments from the car owner. The company received the policy and the certificate from the insurance company and retained them pending the payment of the instalments. In such a case the company is not the agent of the car owner and delivery to them is not delivery to the car owner, but the policy is "effected" by the car owner and not by the company. A further point incidentally arises as to whether the company can produce the certificate to the police under the proviso to the Road Traffic Act, 1930, s. 40 (2). In the present case they sent it to the police by post which is clearly not a production in person within the proviso. Having regard to the fact that the company is not the agent of the car owner it would seem to be impossible for them to effect the production required by the proviso.

AS TO CERTIFICATE OF INSURANCE, see HALSBURY, *Hailsham Edn.*, Vol. 18, p. 563, para. 911; and FOR THE PROVISIONS FOR INSURANCE IN THE ROAD TRAFFIC ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 636.]

CASE stated by Justices of the Borough of Rotherham who had convicted the appellant, William Henry Starkey, on an information preferred against him by Robert Hall, Chief Constable of Rotherham.

The appellant was driving a motor car in Rotherham on Sept. 9, 1935, and was stopped for exceeding the speed limit. He was asked to produce his certificate of insurance required by the Road Traffic Act, 1930, but he had not the certificate in his possession as he had entered into an

agreement with Mutual Finance, Ltd., to advance to him the full amount of his premium; the appellant undertaking to repay the premium by instalments. Mutual Finance, Ltd., were to pay the premium direct to the insurance company and as part of their security they were to retain the policy and the certificate of insurance. Mutual Finance, Ltd., produced the certificate to the police within five days of the offence. The respondent took the view that this was not an adequate compliance with the Act. Summonses were taken out under Road Traffic Act, 1930, ss. 35 and 40, and were heard on Oct. 11, 1935. The justices found that a breach of sect. 35 had been proved and they imposed a fine of 40s., but did not endorse the licence.

Frank Soskice for the appellant: If a certificate is delivered to a person designated by the insurer, it is a sufficient compliance with the Act. The certificate was issued in accordance with the Road Traffic Act, 1930, s. 36. Alternatively in delivering a certificate to Mutual Finance, Ltd., in pursuance of the terms of the agreement, a sufficient delivery was effected as Mutual Finance, Ltd., were the persons who effected the insurance.

Vernon Gattie, for the respondent, was not called upon.

LORD HEWART, L.C.J.: This appeal must fail. The Act of Parliament is quite plain. The Road Traffic Act, 1930, s. 35 (1) provides:

Subject to the provisions of this part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this part of this Act.

By sect. 36 (5) it is provided:

A policy shall be of no effect for the purposes of this part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this part of this Act referred to as a "certificate of insurance") in the prescribed form.

Sect. 40 (1) provides:

Any person driving a motor vehicle on a road shall, on being so required by a police constable, give his name and address and the name and address of the owner of the vehicle and produce his certificate, and if he fails so to do he shall be guilty of an offence.

There is a proviso, which provides that if he produces it in person within five days, he shall not be convicted. Here, apart from other matters, it is found as a fact that the certificate had never been delivered to the appellant by the insurer and the appellant had never seen it. The certificate was in fact in the possession of a company called Mutual Finance, Ltd., who held, for their own safety, both the policy of insurance and the certificate. In these circumstances the justices came to the conclusion

that the appellant was a person who effected an insurance and that the certificate of insurance had not been delivered to him. The justices were of opinion that the policy was of no effect for the purpose of that part of the Act, and therefore, they convicted. In my opinion the justices were perfectly right for the reasons they have given. Sect. 36 (5) contemplates that there may be in existence a valid policy of insurance, but a valid policy of insurance shall be of no effect for the purpose of this part of the Act unless and until there is delivered by the insurers to the person by whom the policy of insurance was effected a certificate. The appellant never had it. The insured person and the finance company had entered into a scheme which might have good features from the points of view of both of them, but the uncontroverted feature was that it might render compliance with the Act impossible.

DU PARCQ, J.: I agree. Part of the argument on behalf of the appellant was that there was delivered by the insurers to the appellant a certificate of insurance and in order to establish that proposition, counsel relied upon an admission set out in para. 5 of the case. It is an admission as to the contents or the effect of a written agreement. In my opinion it is very inconvenient that a written agreement should be dealt with in that way. It is not possible to decide a case upon admissions as to the construction of an agreement, the construction of an agreement being a question for the court. It is wrong to rely upon an admission as to what is a correct summary of an agreement—probably of a complicated nature. For the purpose of to-day, however, it is sufficient to say, that the admission does not go far enough. There was nothing to show that there was a delivery to the appellant in the sense of a delivery made to his agent. That is to say, it is not shown, and there is no admission, that Mutual Finance, Ltd., were under a duty to hand over the certificate to the appellant at any time at his request. On the contrary, there was no such duty upon them and there was a right for them to retain the certificate in order to safeguard their position. That disposes, in my opinion, of the first point.

The other point is that the policy was effected by Mutual Finance, Ltd., and therefore a policy was delivered to the person by whom it was effected because it was delivered to Mutual Finance, Ltd. I think it is plain that this Act contemplates a person as the assured, and moreover, it appears from this case that the person who did effect the policy was the assured. The proposal form was prepared on his behalf and it was signed by him. The only claim of Mutual Finance, Ltd., was that the agreement permitted them to receive the policy which the appellant had effected and which the insurers had delivered to them. I am clearly of opinion that on both these points, Mr. Soskice's argument fails and I agree that the conviction should be upheld.

GODDARD, J.: I agree. No one denies or desires to throw any

doubt upon the fact that a certificate can be received by somebody as an agent for the assured. The assured can send his chauffeur or clerk, or servant, to receive his certificate. He can allow the agent to hold it and the agent, in these circumstances, would have to deliver it to his employer, at any rate, if he was asked for it. That was not done here. The policy and the certificate were hypothecated to Mutual Finance, Ltd., and they held in their own right and were not holding for the assured. The mischief arises because the Act requires that the insured person shall produce his certificate in person if required to do so, and if it is held by Mutual Finance, Ltd., he cannot do so. He never did so. It was sent by post. The justices in this case came to a right decision on the facts and consequently acted correctly.

Appeal dismissed with costs.

Solicitors : *David Balfour & Co.* (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *Charles L. des Forges*, Rotherham (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

WESTMINSTER CITY COUNCIL v. TREBY.

[CHANCERY DIVISION (Farwell, J.), April 21, 1936.]

Companies—Debenture—Receiver—Preferential debt—Payment to debenture holder—Refunding—Indemnity—Legality of payment—Companies Act, 1929 (c. 23) s. 78.

A sole debenture holder appointed a receiver. The latter proceeded to realise the assets of the company, and paid four sums of £25, £50, £10 and £10 respectively to an agent of the debenture holder. Between the time of the first and second payment the receiver received a claim for rates in respect of certain premises occupied by the company. The receiver till then had been quite unaware that the company had occupied these premises and he therefore inquired of the managing director of the company and the agent of the debenture holder whether the claim was valid. Both assured him it was not. He therefore made the second payment but the claim being repeated, he stopped the cheque sent in payment and made further inquiries of the agent of the debenture holder. He was again assured that the claim was invalid but he only allowed the cheque to be paid upon the agent giving an indemnity. Ultimately the local authority sued the receiver for the amount of the rates and he joined the agent and the debenture holder as third parties. The claim of the local authority was subsequently admitted, and the action proceeded as to the liabilities of the third parties to the receiver. For the third parties it was contended that the receiver in making payments to the debenture holder without first satisfying that claim for rates had acted in contravention of the Companies Act, 1929, s. 78, and was therefore setting up his own wrong and basing his claim on his own contravention of a statute :—

HELD : (i) the payment to the debenture holder was not *per se* an illegal act but only illegal in certain circumstances, and as the agent had misrepresented the facts and induced the receiver to believe he was acting quite legally the defence of illegality failed.

(ii) the agent was liable upon the indemnity to repay the receiver the amount he had paid in respect of the claim and costs.

(iii) the debenture holder was liable to refund to the receiver the payments made after she had notice of the claim for rates.

(iv) notice to the agent was notice to the debenture holder and the latter must therefore refund the last three payments.

(v) the receiver could not receive from the agent and the debenture holder a greater sum than the total amount he had paid in respect of the claim and costs.

[EDITORIAL NOTE.] The Companies Act, 1929, s. 78, enacts that a receiver shall give priority to preferential debts. A duly appointed receiver having been deceived by an agent of a debenture holder to pay him and refuse payment of a local authority's claim for rates, the question arose whether such payment was an illegal act *per se* and subject to the maxim *si turpi causa non ovitur actio* or was an act which according to circumstances might be legal or illegal. Clearly the latter is the correct view and the receiver was entitled to enforce an indemnity he had taken from the agent and to require the debenture holder to refund the money paid over to her, provided she had notice of the claim.

AS TO PAYMENTS OF PREFERENTIAL DEBTS BY RECEIVER, see HALSBURY, Hailsham Edn., Vol. 5, p. 518, para. 840, and FOR THE CASES, see Digest, Vol. 10, p. 793, Nos. 4981, 4982.]

Cases referred to :

- (1) *Mozham v. Grant*, [1900] 1 Q.B. 88 ; 9 Digest 473, 3106.
- (2) *Re Aidall, Ltd.*, [1933] Ch. 323 ; Digest Supp.
- (3) *Burrows v. Rhodes*, [1899] 1 Q.B. 816 ; 42 Digest 980, 112.
- (4) *Brightman & Co., Ltd. v. Tate* (1919), 35 T.L.R. 209 ; 42 Digest 701, 1172a.
- (5) *A.-G. v. London & North Western Railway Co.*, [1900] 1 Q.B. 78 ; 42 Digest 753, 1778.

ACTION for the recovery of £76 11s. 5d. subsequently reduced to £66 12s. 11d. alleged to be due in respect of rates from the defendant as receiver appointed by a debenture holder. The defendant by notice brought in two third parties upon the ground that one was liable to him under an indemnity and the other was liable to refund certain moneys paid by him to such party as assets realised in the course of his receivership. The only contest was as to the liability of the third parties.

The company, H. Sayers & Co., Ltd., was incorporated in 1933, and carried on business at two separate establishments, one in Shepherd's Bush and the other in the Strand. The company issued a single debenture to a Mrs. Cohen for £350, and in 1934, although the company was not in liquidation, she considered it expedient for business reasons to appoint a receiver in respect of her debenture. The receiver having realised certain assets of the company, he paid by cheque £25 to her agent.

Neither the receiver nor the debenture holder had knowledge at the time of this first payment of any business being carried on by the company other than at the premises in Shepherd's Bush. Following this payment the receiver received a claim from the plaintiff corporation for rates in respect of the Strand premises and he at once inquired from both the agent and the managing director of the company as to the validity of this claim.

He was assured that the claim was not valid and that no liability existed against the company. The receiver, being satisfied, on the following day gave another cheque for £50 to the agent and immediately afterwards stopped the cheque upon receiving a further notice of claim from the plaintiff corporation. He again consulted the agent, who assured him that if there was any claim it was against himself as tenant of the Strand premises and in no way against the company. Upon this assurance and upon receiving a written indemnity from the agent, the receiver allowed the cheque for £50 to be paid, and paid two further sums of £10 each, making £95 in all. The corporation then sued the receiver for the amount due. The receiver obtained leave from the master to join the debenture holder and her agent as third parties and he subsequently informed them that he intended to consent to judgment as against the corporation and to proceed against the agent under the indemnity and against the debenture holder as liable to refund the sums so paid. No reply was received to this notice of his intention and he accordingly consented to judgment for £66 12s. 11d. and £32 0s. 4d. costs. The action was then continued against the third parties in respect of their liability to the receiver.

Hon. Denys Buckley for the defendant Treby : As against the third party Ross Gordon I base my claim on the written indemnity. It extends to the whole amount which the receiver has had to pay the corporation. As against Mrs. Cohen, my client was in a fiduciary position and must pay preferential creditors first (*Moxham v. Grant* (1); *Re Aidall, Ltd.* (2)). Gordon was Mrs. Cohen's agent and any notice to him must have been notice to her. They acquiesced in our signing the consent judgment. As for the principle that, because this agreement of indemnity induced my client to do something contravening the statute it was void as contrary to public policy, this does not apply because at the time my client did not know it was a wrongful act (*Burrows v. Rhodes* (3)). If he found out later it was wrong he is still entitled to his indemnity. He was justified in making the payment on Gordon's representation. The demands were there, and he only sought the indemnity as a precautionary measure. There is no element to vitiate the contract.

T. J. Phillips (with him *H. G. Garland*) for the third parties, Mrs. Cohen and Ross Gordon : The receiver paid the moneys with full knowledge of the corporation's claim for rates, and he admits he had some doubt as to its validity or invalidity which led him to seek the indemnity.

The Companies Act, 1929, s. 78, is mandatory and lays on the receiver a positive duty in certain circumstances here present. Disregard constitutes a criminal offence and he can be indicted for a common law misdemeanour. The receiver cannot pray his own wrongdoing. (HALSBURY, Vol. 27, p. 190, para. 374 ; p. 193, para. 381 ; *Brightman v.*

Tate (4)). What is done in contravention of a statute cannot be the subject of an action (*Attorney-General v. L.N.W.Rly. Co.* (5)). I admit the written indemnity but it was to cover the possible results of an illegal action. The receiver knew the law—he knew the rates were a preferential claim. He did not take sufficient steps to ascertain the true position. I admit that Mr. Gordon was Mrs. Cohen's agent up to a point, but not as to the indemnity. He had nothing to do with the company. The fact that the money was wrongfully paid does not prevent it being money due to Mrs. Cohen as sole debenture holder.

FARWELL, J. : This is a claim by the defendant Henry Charles Treby against two persons who are third parties, Mrs. Dinah Cohen and Mr. Ross Gordon. The claim arises in this way : in 1933 a company known as H. Sayers & Co., Ltd., was incorporated under the Companies Act, 1929, and that same year the company issued one single debenture for £350 to Mrs. Cohen. On Jan. 4, 1934, Mrs. Cohen appointed the defendant Treby as receiver, which she did as sole debenture holder. The company was not in liquidation when he was appointed. He recovered certain moneys and on Jan. 24, 1934, he made a payment to Mrs. Cohen of £25. The payment was made by a cheque which was handed to Mr. Gordon on the footing that he would pass it on to Mrs. Cohen. At that time when this cheque for £25 was paid the receiver did not know of any trade being carried on at or rates in connection with the premises in the Strand. The receiver at that time believed that the only premises in which the company was carrying on business were at Shepherd's Bush, in respect of which a claim for rates had previously been made by the Hammersmith Corporation, and had been paid. At that date when this payment of £25 was made the receiver had no knowledge of any claim by the Westminster City Council in respect of the premises in the Strand, nor on the evidence can I find any reason to believe that Mrs. Cohen had knowledge of any such claim at that date, and even if at that time Gordon was her agent there is no evidence which satisfies me that at that date Gordon was aware that the Westminster City Council was claiming for rates. It follows with regard to that payment, in my judgment, on the evidence, that it was made at that time with no notice of the claim and that Mrs. Cohen had no knowledge of any either.

On Feb. 2, the receiver did receive a notice from the Westminster City Council claiming £76 11s. 5d. in respect of the general rates of the shop and basement known as numbers 442–443 Strand for the period Oct. 2, 1933, to Nov. 24, 1934. As I have said, the receiver at that date did not know of any business being carried on at the Strand premises nor was he aware that the company had ever been in occupation of those premises. He thought that the only premises where business was being carried on were at Shepherd's Bush and, not unnaturally, wishing only to apply moneys as he should apply them, he sought information from

persons who were likely to know the true position. He inquired from Mr. Sayers, who was one of the directors of the company—in fact the managing director—with regard to the claim and was told that there was no claim upon the company with regard to these premises. Not content with that, the receiver also consulted Gordon, who was the son-in-law of Mrs. Cohen and throughout these transactions acted on her behalf. Mrs. Cohen herself had nothing to do with the receiver and never saw him until a year later, and even then she told him that the whole matter was in the hands of Gordon, who was her son-in-law, and that he knew all about it. Gordon was consulted by the receiver, and he also assured him that the company was not liable for these rates, and apparently the receiver was satisfied that the claim against the company was not justified.

On Feb. 3, 1934, the receiver drew another cheque for £50 to Mrs. Cohen, which he handed to Mr. Gordon for Mrs. Cohen, part of the moneys which he had recovered as receiver, and which, apart from any preferential claims, was her money. And he handed it to Gordon, believing at that date that there was no valid claim with regard to the Strand premises, but on that same day, Feb. 3, which was a Saturday, he received a letter containing a further claim. So, being disturbed, he got into communication with Mr. Gordon, and stopped the cheque for £50 until he was satisfied as to the position. On the following Monday he again saw Mr. Gordon, who assured him there could be no liability against the company and that the demand was against him (Gordon) as tenant, or against the landlord, and he assured the receiver that in the circumstances Mrs. Cohen was entitled to be paid £50, and on that day he gave a letter in which he indemnified the receiver in the event of the authorities insisting on payment from him. Upon that assurance and upon getting the letter the receiver gave the necessary instructions, as a result of which the cheque was paid and the money passed to Mrs. Cohen accordingly.

There were two further payments to Mrs. Cohen of £10 on Feb. 9, 1934, and another £10 on June 1, 1934. She therefore received through Gordon from the receiver in all a sum of £95. On Feb. 15, there was a further letter from the collector demanding payment, but at that time Gordon again assured the receiver that there was no claim, and that he himself had seen the collector and there was no claim against the company. The receiver was satisfied, and remained so until Sept. 27, when for the first time since Feb. 15, there was a further claim against him by the Westminster City Council. The receiver had paid £95 to Mrs. Cohen, and not having moneys in his hands to provide for this claim, and having doubts as to whom it was properly payable, he did not pay, and on Apr. 16, 1935, the Westminster City Council commenced this action against him claiming payment of rates. The defendant

thereupon got leave to institute these third party proceedings against Cohen and Gordon and claimed to be indemnified against any sums which he might have to pay to the plaintiff in the action.

Later, on Feb. 17, 1935, the receiver, through his solicitors, gave notice to the third parties that he proposed to consent to judgment and continue the action against them, and later the receiver consented to judgment against himself for an agreed sum of £66 12s. 11d. and £32 0s. 4d. costs.

The receiver then became liable to the Westminster City Council, and it is in respect of that liability that he now seeks to recover from the defendants, in the case of Mrs. Cohen to the extent of the sums paid to her, totalling £95.

I find as a fact, which is not disputed, that Gordon throughout the proceedings from Feb. 3 had acted as agent for Mrs. Cohen, and he was duly qualified with regard to dealing with the proceedings. The agency is not admitted in Mrs. Cohen's defence, but there is no denial by Gordon in his defence, and it is quite plain from Treby's evidence that Gordon had Mrs. Cohen's authority to bind her.

The defences to this claim are based upon the same proposition. Mr. Phillips, acting on behalf of both the third parties, addressed to me a very attractive argument, and he said everything which he properly could in their favour, but I have no doubt that the receiver is entitled to recover against the defendants, in the case of Mrs. Cohen not quite the full amount, against Gordon the full amount.

The defence is based upon this: it is said that by virtue of the Companies Act, 1929, s. 78, it was an illegal act on the part of the receiver to pay these moneys to Mrs. Cohen and to have failed to pay the corporation as preferential creditors. Sect. 78 provides:

78.—(1) Where, in the case of a company registered in England, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

It is not disputed that under Part V of the Act the Westminster City Council's claim is a preferential payment and that that body is entitled to be paid in full before the debenture holder, and it has been truly said that it was illegal on the receiver's part to make the payments without

proving the claim. And it has been said that no agreement for indemnity nor claim for contribution or indemnity can be sustained, on the grounds that the receiver cannot set up his own wrongful act, and that he cannot claim indemnity in the circumstances, and I have been referred to authorities giving effect to the principle that a man cannot set up his own wrongful act to bar a claim against him by other persons.

But I think that a limit must be put upon this principle that when two parties enter into an agreement to do what is *per se* an illegal act it is plain that neither party can enforce a contract which is known to both parties to be illegal at the time when it was made. On the other hand, when there is an agreement between two parties which is not necessarily illegal *per se* but only in certain circumstances, in the absence of which the agreement to do the act is not in itself illegal, and that agreement is induced by one of the parties representing that the act is innocent, then if the representation is accepted by the other party, the latter is not precluded from suing on the agreement. In the present case the payment to the debenture holder was not in itself illegal. She was the person who was in the absence of preferential claims entitled to payment, and so long as there was no valid preferential claim the receiver was bound to pay her sums recovered by him. There can be no doubt that the payment was illegal if there was a valid claim by a preferential creditor. But unless these circumstances existed the payment to Mrs. Cohen was not illegal. Here Gordon, as Mrs. Cohen's agent, represented to the receiver that there was no valid claim with regard to the rates. That representation was accepted as a fact, and the receiver acted upon it. He was satisfied at the time of the payment that the Westminster City Council had no right to payment, and that if any sum was due to them it was not from the company. That misapprehension was induced by Gordon as agent for Mrs. Cohen. The result is that Mrs. Cohen has benefited to the extent of these moneys which should properly have gone to the Westminster City Council.

In my judgment, when there is an agreement between two parties with regard to an act which may be illegal but which only becomes illegal in certain circumstances there is nothing to prevent the court enforcing the agreement if the court is satisfied that the party seeking to enforce was led in fact to believe that in the circumstances the act was legal, although the representation was false and the act was prohibited by an Act of Parliament. If that is so, and in my judgment it is so in this case, the agreement between Gordon and the receiver, by which Gordon indemnified the receiver against sums for which he might ultimately become liable to the Westminster Corporation, is not one to which the court need refuse to give effect, the agreement was entered into by the receiver and the payment was made in the *bona fide* belief that it was a payment which he was bound to make. The fact that the

circumstances made it otherwise was the result of the misrepresentation. In my judgment there is nothing to prevent the receiver claiming indemnity against Gordon and he is entitled to succeed, and he is entitled to a judgment for £98 13s. 3d. accordingly.

As against Mrs. Cohen the position is a little different. Part of the payments to her were made at a time when neither she nor the receiver had knowledge of any claim by the corporation and in my judgment, in view of the circumstances, she cannot be made to refund **that sum**. Other sums were paid to her at a time when she must have been taken to know through Gordon, who knew all about it. How far he knew whether the claim was valid or not is another matter, but that he knew is beyond doubt. Therefore the position is that the receiver had paid certain sums believing on the representation of Gordon that Mrs. Cohen was entitled to these sums, Mrs. Cohen having notice of the fact of a claim which is successful would entitle the claimant to be paid before herself, and the result is that the Corporation could have sued Mrs. Cohen for £70 and recovered from her. She knew of the claim and they could have pursued their remedy against her. They did not elect to do so but chose to sue the receiver. In the circumstances in my judgment the receiver is entitled to call upon Mrs. Cohen who has received the moneys which should have gone into the pockets of the Corporation at the time such sums were so received. With regard to the sum of £25 there is no evidence that Mrs. Cohen had notice of the claim at the time this was paid. At the time of the subsequent payments through Gordon she did know of the claim.

According to my judgment the receiver can call upon Mrs. Cohen to refund £70 to him which he had to find and the defendant is entitled to a declaration that he is entitled up to £70 and for that amount and for costs. But the defendant is only to receive the total amount which he had to pay to the Corporation. If he gets judgment in full against Gordon he would be entitled to recover against the Corporation. But if he gets judgment in full against both he cannot get the full amount from both. He cannot be paid twice over, so I propose to add to the two judgments a proviso that the defendant is not entitled to receive any total sum exceeding £98 13s. 3d.

Solicitors: *J. E. Baring, Gomm & Co.* (for the defendant); *Reece-Jones & Co.* (for the third parties).

[Reported by CHARLES E. EDEN, Esq., Barrister-at-Law.]

EARL OF CADOGAN v. GUINNESS AND OTHERS.

[CHANCERY DIVISION (Clauson, J.), April 23, 24, 1936.]

*Real Property—Restrictive covenants—Discharge or modification—Leaseholds—
 “Term of more than seventy years, after the expiration of fifty years of the
 term”—Law of Property Act, 1925 (c. 20), s. 84 (12).*

By a lease executed on Jan. 31, 1888, a term of ninety-nine years was created commencing on Mar. 25, 1874, subject to certain restrictive covenants. On Oct. 14, 1935, an application was made under the Law of Property Act, 1925, s. 84 (12) for the discharge or modification of one of the restrictive covenants:—

HELD: the term was created fourteen years after it was stated to commence and was, therefore, a term for substantially eighty-five years. The period expired must be calculated from the execution of the lease and was, therefore, forty-seven years. The lease was therefore one for a term of more than seventy years, but as fifty years had not expired at the date of the application, it was not a lease in respect of which there was jurisdiction to make an order under Law of Property Act, 1925, s. 84 (12) for the discharge or modification of a restrictive covenant contained in it.

[EDITORIAL NOTE.] The point here is a very restricted one. In the first place the case is only concerned with the construction of a statute. The leases in question were dated and executed long after possession had been taken under them, and the terms were to be calculated from the date of possession. For the purposes of the statute the leases “commenced” on the date of execution and were for a term calculated from that date, and the lease could not begin to “expire” until after execution. In order to satisfy the words “after the expiration of fifty years of the term,” a period of fifty years after the date of the lease must have expired.

AS TO COMMENCEMENT OF LEASE, see HALSBURY, Hailsham Edn., Vol. 20, p. 146, para. 158; and FOR CASES, see DIGEST, Vol. 30, p. 461, 462, Nos. 1225-1244.]

Cases referred to:

- (1) *Bird v. Baker* (1858), 1. E. & E. 12; 30 Digest 465, 1267.
- (2) *Shaw v. Kay* (1847), 1 Exch. 412; 30 Digest 464, 1265.

ADJOURNED SUMMONS issued on behalf of Earl Cadogan, the estate owner in fee simple of the Cadogan Settled Estates in Chelsea, London, for the determination of the following question: Whether upon the true construction of the Law of Property Act, 1925, s. 84 (12) any, and if so, which of the houses and other premises in Chelsea mentioned in the schedule to the summons and demised by certain leases and underleases were held under such leases and underleases respectively for terms of which fifty years had expired within the meaning of the said subsection on July 3, 1935.

The summons arose out of an application under the Law of Property Act, 1925, s. 84, dated Oct. 4, 1935, of the leaseholders of nineteen (subsequently reduced to fifteen houses in Cadogan Square, Chelsea, to the Official Arbitrator for discharge or modification of a restriction affecting the premises. On Nov. 15, 1935, grounds of objection were served contending, *inter alia*, that there was no jurisdiction to grant relief

under sect. 84 in respect of the above-mentioned fifteen properties as they were all leaseholds held for terms which, though expressed to commence from dates long prior to the actual dates of the leases or underleases, in substance and effect only commenced from the dates of the respective leases and underleases and consequently were held for terms of which fifty years had not expired at the date of the application.

The Law of Property Act, 1925, s. 84 (12) provides :

Where a term of more than seventy years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of fifty years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold.

All the fifteen properties referred to in the objections were held under leases and underleases granted respectively between Sept., 1885, and Apr., 1897. They were all for terms of ninety-nine years from Mar. 25, 1874, and were all granted pursuant to the terms of building agreements dated respectively Mar. 25, 1874 and Mar. 23, 1876.

Fergus D. Morton, K.C., and *P. M. Walters* for the plaintiff : Every one of these leases and underleases is after July 31, 1885, and so no one of them was ever a term of which fifty years had expired at the date of the application to the authority, which was made on July 31, 1935. A term does not come into existence until the lease is executed, and that being so, it can make no difference that, in the document itself, the term is expressed to be computed from an earlier date : *Shaw v. Kay* (2). The rent begins to run from the day the leases are executed. The reason for the subsection is that a recently created contract between a lessor and lessee must not be interfered with, but after fifty years have run the conditions of the neighbourhood may have completely changed.

Sydney M. Noakes, for the defendants : The fifty years period within the meaning of sect. 84 (12) runs from Mar. 25, 1874.

CLAUSON, J. : The words are after the expiration of fifty years of the term. Can a thing expire which does not exist ?

Noakes : I rely on *Bird v. Baker* (1) in which it was held, in a lease made on July 19, 1851, *habendum* to lessee from Dec. 25, 1849, for fourteen years next ensuing, with a provision for determination at the expiration of the first seven years of the term, that the seven years were to be reckoned from Dec. 25, 1849. One must read into every lease the proviso that, at the expiration of fifty years of the term, the lessee may apply for the release of the restrictive covenants. The parties having said that they will take the beginning of the term to be one date cannot now ask that the court shall take it to be another date. It is really a case of estoppel.

CLAUSON, J. : I understand the construction adopted in *Bird v. Baker* (1) to be that where there is a term terminable by notice it is the nominal term which is considered. I cannot agree that the words of the statute must be read into the lease. I have got to construe the statute.

Nor am I concerned with what the parties say. I have to see what the legislature says. You cannot have an estoppel against law. It is a question of law what is the jurisdiction of the arbitrator and what the legislature means by the commencement of the term. It may have been the intention of the parties that the lease should begin in 1874, but the intention of the parties cannot alter facts. The difference between *Bird v. Baker* (1) and this case is that there the court was construing terms in the document.

To my mind the answer to the question asked by the summons in this case seems quite clear. But I may be wrong and different minds may come to a different conclusion. By the Law of Property Act, 1925, s. 84 certain power is given to a certain tribunal to deal with restrictive covenants under certain circumstances. Primarily the section is directed to giving the authority defined by the section that power in relation to freehold land, but it was thought desirable by the legislature that in certain circumstances the authority should have the right to deal with covenants relating to what is not quite accurately called leasehold land, that is, to deal with covenants relating to interests of a leasehold character in land. But it was apparently not assumed that this jurisdiction should be universal. It should be confined to interests of a certain length and of a certain number of years' expiration. The subsection with which I have to deal is in these terms. [His Lordship read the subsection.]

Now it is a very common experience that in the creation of leasehold terms the term which is expressed to be created is expressed to run as from a date anterior to the date of the document which creates the term. It is very common indeed to find a lease in the year, say, 1936, creating a term of twenty-one years as from Dec. 25, 1935. And if in any such lease there is a reference to determination after the first seven years of the term, for the purpose of calculating which are the first seven years, there is no doubt that, on the true construction of the document, the seven years should be construed as beginning from Dec. 25, 1935, and not from the date in March, 1936, when the document was actually executed. But it must be borne in mind that it is not possible by a deed executed in March, 1936, to create a term in such a sense as that it shall bring into existence a term prior to the date of the execution of the deed. That is impossible. Although in the instance I have given the term is looked upon as a twenty-one year's term, in fact it is twenty-one years less the period which had elapsed from Dec. 25, 1935, when the term nominally begins, and the date of the execution of the deed. That seems to me to be a reasonably obvious proposition. But I am supported in my opinion of its obviousness by referring to *Shaw v. Kay* (2), a decision of the Court of Exchequer and a case in which the proposition which I have suggested as being a correct proposition was quite plainly accepted.

Applying that proposition to the section which I have to construe I have first to discover what is the meaning of a term of more than seventy years. In my view a term created by a deed in 1936 to commence as from Dec. 25, 1900, for seventy years would not be a term of seventy years. It would be a term of thirty-four years, namely, seventy years less thirty-six years. And if I were asked in the case of such a term, when does the first twenty years of that term expire, for the purpose of applying this subsection I should be bound to say the first twenty years expires in the year 1956, and not in the year 1920, because in 1920 there was not any term. That, of course, is perfectly consistent with what I have already referred to, that if in a term which, although it is really a term of less than twenty-one years, you have a clause providing for the termination of the term at the end of the seventh or fourteenth year of the term, it is perfectly easy, as a matter of the construction of such a document, to say that that seven or fourteen years, according to the obvious intention of the parties, is not to run from the date of the execution of the deed; but from the moment that is spoken of, although incorrectly, as the commencement of the term. I am construing an Act of Parliament and not a document; and as far as the Act of Parliament is concerned I think that the opinion I have formed is the correct one.

I now turn to the actual problem I have to settle. A claim seems to have been made that the authority under sect. 84 should deal with certain restrictive covenants and the question is whether, having regard to the terms of sect. 84 (12) the authority has jurisdiction to deal with them. I have a number of respondents to the present application, the leases of all being in such a position as to raise the question, and I will take one only as a particular example. It is stated in the schedule to the notice under sect. 84 to be a lease which was dated Jan. 31, 1888, of 52, Cadogan Square, Chelsea, granted by Lord Cadogan to Thomas Andros de la Rue for ninety-nine years from Mar. 25, 1874, at a rent of £25 a year. The defendant in whom the lease is now vested is Mr. George Vernon Tate. It will be observed that the term of ninety-nine years was created fourteen years after the date as from which it was stated, according to the language of the lease, to commence. In my view, having regard to what I have already said, the term was not a ninety-nine years term, but it was a term for substantially eighty-five years. However, if that were the only point in issue, that term is a term of more than seventy years, and so far it comes within the subsection. But the subsection only applies after the expiration of fifty years of the term. When does fifty years of the term expire? In my view, by those particular words the legislature meant when the term has been an existing term for fifty years. In other words fifty years of the term expire fifty years after Jan. 31, 1888, which would be Jan. 1, 1938.

Accordingly, with regard to that particular lease, the jurisdiction of the authority to deal with the covenants will arise only in the year 1938. It is not necessary for me to deal with any of the other leases referred to in the schedule.

It was suggested that there might be a difference between terms and sub-terms, but no point was made of that. As the applicant has succeeded and the respondents have failed the respondents must pay the costs.

Solicitors : *Lee & Pembertons* (for the plaintiff) ; *William Sturges & Co.* (for the respondents).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

GORDON, MACKAY & CO., LTD. v. WATSON.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), April 21, 1936.]

Gaming—Lotteries—Nature of—Betting scheme.

A limited company employed agents to distribute tickets bearing the names of races, horses and jockeys, and also the name of the company, and an offer to exchange the tickets for goods on demand. A member of the public receiving a ticket was entitled to bet on the combinations named on the ticket, in which case if he won he received the amount of his bet ; if he lost he was entitled to exchange the ticket for goods worth sixpence, through the firm's agents. By conditions on the ticket he paid no money to the agents, but undertook to pay 6d. if he lost. The company and its directors were convicted at petty sessions under the Betting and Lotteries Act, 1934, and appealed :—

HELD : (i) the scheme was a lottery.

(ii) the appearance of the name of the company on the tickets, together with evidence that the same agent had distributed similar tickets which had been exchanged by the company for goods, was evidence connecting the agent with the company.

[EDITORIAL NOTE. The arrangements in the case here reported are elaborate in their nature and clearly designed to resemble a bet on credit rather than a lottery. It will be noted that in the event of the ticket-holder winning, there would be no purchase or transfer of any goods at all, but merely the payment of the bet. It was only when the ticket-holder lost that he was entitled to exchange the ticket for goods.

AS TO LOTTERIES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 525-528, paras. 928-929 ; and FOR CASES, see DIGEST, Vol. 25, pp. 454-456, Nos. 434-450.]

Cases referred to :

- (1) *Tarling v. Rome* (1936), 52 T.L.R. 220.
- (2) *Green v. Berliner and Others*, [1936] 1 All E.R. 199.
- (3) *Stoddart v. Sagar, Sagar v. Stoddart*, [1895] 2 Q.B. 474 ; 25 Digest 463, 497.

APPEAL by way of case stated against a conviction by the justices at Goole on Aug. 14, 1935, under the Betting and Lotteries Act, 1934.

Two summonses were brought against each of four defendants, the company Gordon, Mackay & Co., Ltd., and the three directors of the company, for (i) causing tickets in a lottery to be sold between July 1 and Aug. 2 of 1935; and (ii) causing tickets to be distributed, contrary to sect. 21 (1) (d) (e) of the Act.

On July 10, 1935, one Hawksworth, an agent of the appellants, was in possession of certain tickets relating to horses and jockeys, and a catalogue which described numerous articles which could be obtained in exchange for a certain number of tickets. The tickets were distributed free by other agents. Sixpence was payable in respect of each after the events were concluded, but no money passed to any agent.

Evidence was given that a person who purchased a winning ticket received, not a prize, but the amount of his bet upon the horse of which the ticket bore the name. If he did not win, he could hand his coupons to an agent of Gordon, Mackay & Co., Ltd., and obtain certain articles in exchange for them. The four appellants were all convicted upon both summonses and fined £12 10s. 0d. on each information, a total of £100.

E. W. Cave, K.C., and *A. J. Flint*, for the appellants: This is a form of advertisement not necessarily constituting a lottery. There was no evidence connecting the appellants with the issue of these tickets which was sufficient to satisfy the rules of evidence and justify a conviction, for a criminal offence. The only evidence was the production of the tickets with the appellants' name upon them, and of the catalogue. Statements made by Hawksworth could not be accepted as evidence against the appellants, and the appellants' name upon the tickets was no evidence that they had authorised the sale or distribution of the tickets. To say that Hawksworth was the agent of Gordon, Mackay & Co., Ltd., because their name was on the tickets is begging the question. The only evidence is that a document was produced with the appellants' name upon it; that is not enough to support a criminal charge. There must, in law, be evidence sufficient not merely to establish a *prima facie* case, but to prove it beyond reasonable doubt.

These tickets constituted a bet and not a lottery. The appellants are in precisely the same position as a bookmaker who offers to bet against a particular jockey or against certain horses and jockeys in combination, and who, upon the success of the horses or jockeys, has to pay, not out of a particular fund, but independently of any amount which he puts aside for the purpose of being distributed. He may conceivably have to pay something which far outweighs any advantage that he can get for selling the tickets. A person betting has the opportunity of exercising his judgment in the selection he makes. [Counsel referred to *Tarling v. Rome* (1), *Green v. Berliner* (2), and *Stoddart v. Sagar* (3).]

H. Hylton-Foster, for the respondents, was not called upon.

LORD HEWART, L.C.J. : In my opinion this appeal fails. It is not necessary to re-state the facts. I think that the justices were well entitled to come to the decision to which they came. They were right in over-ruling the preliminary objection : they were entitled to connect the tickets with the limited company and with the directors of that company.

With regard to the main point, whether there was or was not a scheme for the distribution of prizes, I think that the contentions made by the respondent below were both good and that the justices were right in convicting. The scheme was broadly designed—as all such schemes are—to escape the net of the Lottery Act. On the face of it the scheme appears to be an innocent scheme for the sale of goods in a certain manner, but it is perfectly obvious that the real function of this scheme was to attract purchasers by means of a lottery. There is no real difference between what took place here and what was taking place where pounds of tea were being sold and some of the packets contained a coin of the realm. There is not in this case, as there was not in that case, a prize fund to be distributed. That seems to me, however, to be immaterial. The appeal must be dismissed.

DU PARCQ, J. : I agree. I will add, upon the point that is founded upon the decision of ATKINSON, J., in *Tarling v. Rome* (1), and on an opinion of my own, that I thought in that case (*Green v. Berliner* (2)) that the mere fact that the name of a printer appeared upon a document which was produced and which it was an unlawful act to print and publish at all was not sufficient to show that the printer had indeed printed it. This case seems to me to be different. In this case similar vouchers or tickets had been distributed by the same man who distributed those which were the subject of the charge before the justices, and the recipients had received goods. It seems to me that, when the justices find as a fact that these two witnesses had received goods in exchange for vouchers, they mean that the goods were received from the people who are stated on the face of the vouchers to be prepared to exchange goods for the vouchers. That is ample evidence upon which the justices could find that the man who distributed these tickets was acting as an agent for Gordon, Mackay & Co., Ltd. I agree, and for the same reasons given by my Lord.

GODDARD, J. : I agree.

Appeal dismissed with costs.

Solicitors : *J. D. Langton & Passmore*, agents for *Flint, Marsden & Bishop*, Derby (for the appellants) ; *Warwick Williams & Marchants*, agents for *Sir Charles McGrath*, County Solicitor, Wakefield (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

Re RECKNELL, WHITE *v.* CARTER.

[CHANCERY DIVISION (Clauson, J.), April 22, 23, 1936.]

Will—Construction—“All other money invested or in the London and County Bank”—Residuary gift.

A testatrix by her will made in 1902, when she was living in Isleworth, after giving certain specific and monetary legacies directed that “all other money invested or in the London and County Bank” should be divided among the persons therein named. The testatrix, who had not had an account with the London and County Bank for many years, died in 1934, at Bexhill, where she had been living for some years:—

HELD: upon a proper construction of the will and in the circumstances of the case the words “all other money” constituted a residuary gift and the words “invested or in the London and County Bank” were mere words of enumeration and not qualifying words.

[EDITORIAL NOTE.] The word “money” in a will is generally strictly construed unless there is a context which suggests a wider meaning being given to it. The context may allow a wider construction and may ultimately extend the meaning of the word to include the whole residuary estate. Here the main contest was as to whether the context was mere enumeration or qualifying words restricting the meaning of the word “money” itself.

FOR THE MEANING OF “MONEY,” see HALSBURY, 1st Edn., Vol. 28, Wills, p. 705, para. 1327; and FOR CASES, see DIGEST, Vol. 44, pp. 720-728, Nos. 5710-5811, and pp. 593, 594, Nos. 4175-4187.]

Cases referred to:

- (1) *Drake v. Martin* (1856), 23 Beav. 89; 44 Digest 594, 4179.
- (2) *Dean v. Gibson* (1867), L.R. 3 Eq. 713; 44 Digest 594, 4181.
- (3) *King v. George* (1877), 5 Ch. D. 627; 44 Digest 594, 4183.
- (4) *Re Roberts, Kiff v. Roberts* (1886), 55 L.T. 498; 44 Digest 594, 4185.
- (5) *Cambridge v. Rous* (1802), 8 Ves. 12; 44 Digest 417, 2484.
- (6) *Re Woolley, Cathcart v. Eyskens*, [1918] 1 Ch. 33; 44 Digest 728, 5810.
- (7) *Re Taylor, Taylor v. Tweedie*, [1923] 1 Ch. 99; 44 Digest 582, 4049.
- (8) *Re Egan, Mills v. Penton*, [1899] 1 Ch. 688; 44 Digest 756, 6149.
- (9) *Re Skillen, Charles v. Charles*, [1916] 1 Ch. 518; 44 Digest 728, 5808.
- (10) *Khoo Tek Keong v. Ch'ng Joo Tuan Neoh*, [1934] A.C. 529; Digest Supp.

ADJOURNED SUMMONS taken out by Charles Herbert White, the legal personal representative of the testatrix, Ann Recknell, and asking whether certain items of property, which are set out in the judgment passed under the will of the testatrix, who died on Feb. 7, 1934. The will was dated June 7, 1902, and was as follows:—

This is the last will and testament of me Ann Recknell of Clydesdale House Spring Grove Isleworth in the County of Middlesex made this seventh day of June 1902.

I hereby revoke all wills made by me at any time heretofore. I appoint Charles Herbert White to be my executor and direct that all my debts and expenses shall be paid as soon as conveniently may be after my decease.

I give and bequeath unto my sister Kate White (wife of Charles Herbert White) six one hundred shares in the London and Westminster Bank any jewellery trinkets and clothing I possess to my niece and godchild Carry Hope Recknell one hundred

pounds free of legacy duty ; All other money invested or in the London and County Bank to be equally divided between my nieces Kate Eleanor Carter (wife of Charles Ernest Carter) Maud Recknell, Mary Louise Recknell, and my nephew and executor Charles Herbert White.

The shares in the London and Westminster Bank were converted first into shares in the London County and Westminster Bank and later were sold.

A. P. Vanneck, for the plaintiff, stated the facts.

Raymond Jennings, for the second defendant, Maud Clack (formerly Recknell), one of the four persons claiming under the clause of the will to be construed : The question at issue is, do these words " invested or in the London and County Bank " cut down and restrict the meaning which otherwise " money " would have. There are three alternatives : (i) These words are merely descriptive of what the testatrix meant by " any other money " and extend it to money invested, which the word " money " would not otherwise include. This is an example of the line of authorities where it has been held that particular enumeration following a general word do not cut down the generality of the first word : *Cambridge v. Rous* (5) ; *Drake v. Martin* (1), which goes a good deal further and the reasoning of which applies here ; *Dean v. Gibson* (2), *King v. George* (3), *Re Roberts*, *Kiff v. Roberts* (4).

CLAUSON, J. : You get what you want if I construe " all other money " as a residuary gift, but the words " now in the London and County Bank " seem to show that " money " is not used in the sense of property, but as something which can be invested and is measurable in pounds.

Raymond Jennings : (ii) The words " all other money " are sufficient to carry the whole residue. In *Re Woolley*, *Cathcart v. Eyskens* (6), money carried a reversionary interest, and *Re Taylor*, *Taylor v. Tweedie* (7) is an authority for saying that where money is given a larger sense than its strict sense, *prima facie* it is a residuary gift if there is no other residuary gift, and carries the whole residue. See also *Re Egan*, *Mills v. Penton* (8) ; *Re Skillen*, *Charles v. Charles* (9). (iii) The widest meaning should be given to " all other money invested."

Lord Swinfen for the fourth defendant, Kate White, added to represent people interested under an intestacy : The clause in question is an adjectival clause which qualifies the word " money " which does not carry anything more than the actual investments or money in the London and County Bank that are specified. A loan without security is not an investment : *Khoo Tek Keong v. Ch'ng Joo Tuan Neoh* (10). Furniture and household effects, money on current account and accrued income from the settlement are clearly not investments. The money on deposit account is not an investment because the rate of interest is so small, it is money awaiting investment.

The first and third defendants were not represented.

CLAUSON, J. : In the year 1902, Miss Ann Recknell was living at Isleworth, in the County of Middlesex, and was banking at the Hounslow branch of the London and County Bank, and had certain shares in the London and Westminster Bank. In that year she made a will which I will read in a moment. At that time her nephew, Charles Herbert White, who is now a retired bank manager, and who, I imagine, was in 1902 engaged as a bank clerk, was living with her. The lady did not alter her will and she died on Feb. 1, 1934. By that time the circumstances had altered. The lady herself was living at Bexhill, and had long since ceased to have an account with the Hounslow branch of the London and County Bank. Her nephew, the executor, was living in the County of Sussex, at Ninfield Battle, not far from Bexhill. The lady had, some time before, in the year 1919, sold her shares in the London and Westminster Bank, and at the time of her death she had a small sum, £49 2s. 5d., on current account with the Bexhill branch of the Midland Bank, and a substantial sum, £374 5s. 6d., standing to her credit on deposit account with the same bank. There was also owing to her a sum of £300 from her nephew, the executor, in respect of comparatively small sums which she had lent him from time to time. Beyond that she had nothing but furniture and household effects, and, I suppose, personal trinkets and so forth, and quite a small sum, £14, which was due to her as accrued income of certain settled property in which she had a life interest. The gross value of her estate amounted to £751 16s. 5d., and the debts and funeral expenses together amounted to £97 14s. 6d.

I will now turn to her will. It was executed in 1902 in circumstances which, as I have shown, had considerably changed when she died. The will is on a printed form. It is made, as appears on the face of it, so far as it does not consist of the printed form which is not varied much, by the testatrix filling up the gaps in the printed form, and it reads as follows. [His Lordship read the will.]

The first problem I have to solve is this : Does the gift of "all other money invested or in the London and County Bank to be equally divided between my nieces Kate Eleanor Carter (wife of Charles Ernest Carter), Maud Recknell, Mary Louise Recknell, and my nephew and executor Charles Herbert White," amount to a residuary gift? It will be observed, to begin with, that the word "other" appears. What she is giving is what remained after something already mentioned as being taken out. What has she already mentioned? She has mentioned her debts and funeral expenses. Those have got to come out of that remainder which is given to her nieces and nephew. She has mentioned her shares in the London and County Bank. Those have got to come out of whatever it is that is left to her nieces and nephew. The £100 to the godchild, Carry Hope Recknell, has got to come out before reaching that which is divisible among the nieces and nephew. So far it would

look as though "other money" was used in a somewhat wide sense as meaning all the rest of that which is available after paying my debts and funeral expenses, providing a legacy and providing the investment that is specifically given. In other words there appear to be, on the context, ample grounds for holding that she is using "money" not in the sense of cash, but in the sense of property generally. But there is the difficulty that after the words "other money" come these words "invested or in the London and County Bank," and it has been forcibly argued by Lord Swinfen that that phrase is a perfectly straightforward phrase, that it is an adjectival phrase which in effect says: "I am giving all other money of which it can be predicated that it is either invested or in the London and County Bank."

Phrases of this kind have given rise to difficulty in many cases. If it is quite literally read, the argument in favour of the phrase being an adjectival phrase cutting down the substantive words, is very formidable. But there are a number of cases on this kind of point, several of which have been referred to by Mr. Jennings. The most useful ones in this connection are probably *Drake v. Martin* (1), *Dean v. Gibson* (2), and *King v. George* (3); and some assistance is also to be got from *Re Roberts*, *Kiff v. Roberts* (4), where FRY, L.J., with the strictly logical mind that characterised all the judgments of that great judge, was in favour of construing a similar will in a strict adjectival sense, whereas COTTON, L.J., and BOWEN, L.J., took the alternative view, taken in the other cases which I have just mentioned, and many other cases too, that a phrase of this kind, following on words of general import, may well be intended not to be an adjectival phrase, cutting down and limiting that which precedes, but that it simply enumerates, for the information of the executors, the salient facts about the property, or, in this case, the money, which the testatrix has mentioned. It appears to me that, in this particular will, the phrase may be quite fairly and reasonably construed as meaning this, and I think this is what the testatrix did mean. She meant to give all other money, and she goes on to point out: "I want this to be done. I want all my other money to pass to these people, whether it is invested or is in the London and County Bank."

If the alternative method of construing the will is adopted it is necessary to say this, that this gift cannot be construed as a residuary gift. It must be construed as a specific gift, consisting partly of money invested and partly of any money in the London and County Bank which the testatrix may have had at the date of her death. In this particular case, where the lady lived another twenty-two years after she made her will, and moved away to another part of the country, and, quite naturally, had another bank, the thing if so construed becomes a little ridiculous. It means that I must spell out from this will an intention to confine this gift to what was strictly investments

and what was strictly balance at a particular bank. I cannot think that that is the true meaning of it. The phrase "all other money," in the connection in which it appears, bears every mark of being intended to effect a residuary gift, and I think that I shall be giving true effect to the meaning of the testatrix's will and construing it in accordance with her intention, as reasonably plainly exhibited on the face of her will, if I hold that the words "invested or in the London and County Bank" are mere words of enumeration and do not amount to a qualifying of the preceding words. For that method of construing the will there is every justification in the decisions to which I have already referred.

The result of that will be that on the true construction of the will, it disposes of the whole of the property mentioned in para. 1 of the summons. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *John Ashbridge* (for the plaintiff); *Duffield, Bruty & Co.* (for the second defendant); *Bull & Bull* (for the fourth defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

HOWARD v. ODHAMS PRESS, LTD.

[KING'S BENCH DIVISION (Porter, J.), April 24, 1936.]

Contract—Illegality—Public policy—Undertaking not to disclose to trade union a member's confession of wrongdoing—Damages.

Extensive frauds were being carried out on certain newspapers which promoted prize competitions. A sorter who had been in the employ of the proprietors and, as a condition of his employment, a member of the appropriate trade union, made a written statement to the proprietors implicating himself and others in the frauds. A condition of the agreement was that the contents of the statement should not be divulged to any third party. The defendants later forwarded the statement to the union and the plaintiff was expelled, in consequence of which he was unable to obtain further employment. The plaintiff sued the defendants for breach of the agreement:—

HELD: as the confession related to a misdemeanour and the agreement did not bind the defendants from giving evidence if called upon, it was not void as against public policy, but the damage to the plaintiff resulted chiefly from his own wrongdoing and hardly at all from the breach of the agreement, and he was therefore entitled to nominal damages only.

[EDITORIAL NOTE.] The question here is how far an agreement not to disclose details of another's wrongdoing is against public policy and therefore illegal. A careful distinction is here made, even where the wrongdoing is only a misdemeanour, between an agreement not to take the initiative in disclosing knowledge and an agreement to avoid giving evidence when called upon to do so by due process of law, e.g., by *subpœna*. The latter is said to be clearly against public policy

but the agreement here is only construed to be an agreement not to divulge knowledge in the first instance.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 7, p. 161, para. 230, and FOR THE CASES see DIGEST, Vol. 12, pp. 256-263, Nos. 2091-2154.]

Cases referred to :

- (1) *Lound v. Grimwade* (1888), 39 Ch. D. 605 ; 12 Digest 263, 2152.
- (2) *Crompton v. Green* (1848), 10 L.T.O.S. 442 ; 12 Digest 262, 2147.
- (3) *Weld-Blundell v. Stephens*, [1920] A.C. 956 ; 17 Digest 114, 237.
- (4) *Bradstreets British, Ltd. v. Mitchell & Carapanayoti & Co., Ltd.*, [1933] Ch. 190; Digest Supp.

ACTION for damages for breach of an undertaking given by the defendants to the plaintiff, the terms of which were contained in a statement made and signed by the plaintiff on Feb. 26, 1934, and which is fully referred to in the judgment.

The facts and arguments are fully set out in the judgment.

R. O'Sullivan, K.C., and *B. M. Cloutman*, for the plaintiff.

Gilbert Beyfus, K.C., and *Valentine Holmes*, for the defendants.

PORTER, J. : The plaintiff in this action sues the defendants for breach of an undertaking given by the defendants to the plaintiff, the terms of which are contained in a statement made and signed by the plaintiff on Feb. 26, 1934. The claim arises in this way. The plaintiff was employed by the defendants as a sorter in their competition department in the years 1928-1932. His duties, as I understand them, involved the actual handling and sorting of the envelopes sent in by members of the public in the competitions initiated by the proprietors of the newspapers called the *Daily Herald* and the *People*. Being engaged in the work of a newspaper it was incumbent on the plaintiff to become a member of the National Union of Printing, Bookbinding and Paper Workers. If he did not become a member or if he lost his membership, he would lose all chance of employment in any of the trades included in that union unless and until he was reinstated. The plaintiff became a member and retained his membership until deprived of it in the manner described hereafter. For some reason which I need not determine, the plaintiff left his employment with the defendants in the spring of 1932, but was employed by another newspaper in the autumn of 1933. After that date he was unemployed.

Meanwhile the defendants had had trouble with their competitions. It was known or suspected that prizes were being won unfairly, but it was not known by whom or how the fraud was effected. The defendants were anxious to ascertain the methods adopted by the fraudulent winners and to know and break up the gang who were engaged in the swindle. About the end of 1933 or the beginning of 1934 they received an anonymous letter connecting the plaintiff and others with the fraud. They thereupon employed a Mr. Bunn, an ex-police officer, to investigate the matter. Just before the receipt of the anonymous letter one of the

defendants' competitions had apparently been won by a Mrs. Watson with an address in Hastings. She had been suspected, and the cheque which the defendants had sent her had been stopped. Though asked to visit the defendants and establish her claim she had failed to do so. The defendants believed that the plaintiff was connected with the Watson matter, and indeed thought that Mrs. Watson was his sister-in-law. Bunn interviewed the plaintiff and a man called Morris on Feb. 20, 1934, and both made statements. The oral statements then made were not given in confidence. As a result the plaintiff and his wife were taken on Feb. 26 to the Waldorf Hotel to meet a Mr. Cook, the general manager of the *People*. The plaintiff then made a further statement, and was asked if he had any objection to signing it after it had been written out. He said that he had not, but that it would be a serious matter for him if it got to the knowledge of his union, as he might lose his union membership and his chance of a livelihood in any occupation involving membership of the union. He stipulated, therefore, that if he made and signed a statement it should contain a clause embodying a promise that it should not be divulged to any third party. The defendants agreed to the plaintiff's terms and a statement was thereupon prepared and signed by the plaintiff and his wife.

I do not know that it is necessary for me to read the whole of the statement. It describes the plaintiff's connection with certain of the matters of which the defendants were complaining; it describes the method by which the competition swindle is worked; it gives the names of the persons believed by the plaintiff to be connected with the swindle; and it ends up, in the last two paragraphs, in this way:

I am making this statement on the definite understanding that it is not to be used in any way against me, and that it will not be divulged to a third party by anyone present at the taking of the statement. I agree that should, as a result of this information, it be possible for any steps to be taken to clear up this competition swindle, I am prepared, should I be asked, to consider allowing this statement to be used, on one condition:—that the reference with regard to the *Daily Express* is not to be communicated to them nor used against me or my wife in any way.

In addition to giving the information contained in the statement, the plaintiff at this interview promised to assist the defendants to find out the perpetrators of swindles in past competitions, including the Watson fraud, and to assist the defendants to put an end to them. A further interview took place between the same parties on Feb. 28, and the promise of assistance was renewed by the plaintiff. The defendants at both interviews promised, in return, to assist the plaintiff and his wife with money. The plaintiff asserts that promises of large sums were made to him and that in addition the defendants promised to find him employment, not in their own business but elsewhere. I think that considerable sums were mentioned and the possibility of employment was referred to, but

that no promise of a definite sum was made, and I find that the defendants did not promise to find employment for the plaintiff, though I think he was left with the impression that some provision by way of employment or otherwise might be made for him but not with the defendants. The defendants asserted and pleaded that it was a term or condition of any contract made between the parties that the plaintiff should tell the defendants the whole of the facts as known to him and should assist them in ascertaining the whole of the facts in connection with the Watson fraud, and that, as he did not do so, they were absolved from their promise to keep the statement secret.

I find that the promise of information and assistance was an independent promise given in return for promised reward and was neither an express nor an implied term of the promise of secrecy on the defendants' part. I further find that the defendants both knew themselves, and were expressly told, of the necessity of secrecy and that if the facts reached the officials of the trade union it would be disastrous to the plaintiff and might well involve his expulsion and inability to obtain further work in his calling. On the other hand, it was desirable for the sake of the defendants that the existence of fraudulent practices in the competition should not be known to the public, and this fact was known to and impressed upon the plaintiff by Mr. Cook. Primarily the promise of secrecy contained in the statement was meant to protect the plaintiff against the possibility of information reaching his trade union. I doubt if any question of prosecution was present to his mind or to Mr. Cook's and in any case he had no fear of the defendants' publicly making known a matter which they were so anxious to keep secret. If, however, anyone had asked the parties whether the promise of secrecy was to apply to any revelation to the police, I think that both would have said "Yes": the plaintiff because the mere mention of a prosecution would have roused his fears, the defendants because they were anxious at all costs that the public should not be aware of what had been going on. Moreover, the words themselves read in their natural meaning prohibit disclosure to anyone except with the permission of the plaintiff, and prohibit disclosure to the *Daily Express* in any circumstances.

The rest of the story may be rapidly summed up. The defendants allege that the plaintiff did not give them the whole of the information he possessed or assist them to the best of his ability, in that he knew by whom the Watson fraud was perpetrated but withheld the knowledge from the defendants and neglected to assist them in finding out the guilty party. I do not think it is proved that the plaintiff had any such knowledge or that he failed to give such assistance as he could. I doubt if he had much to give and find that he merely used his supposed ability to help in order to try to extract as much money as he could from the defendants. In any case I have found that the giving of such

assistance was no term of the bargain for secrecy. Finding that he was getting neither the money he expected nor any other reward such as employment, the plaintiff wrote three letters to the defendants, the first two to Mr. Cook and the third to a Mr. Elias, who is the chairman and managing director of the defendants' company. In the first two he asks for the work or assistance which he alleges was promised him, and in the third he threatens that if it is not given he will make the whole matter public. To these letters no reply was vouchsafed and without communication to the plaintiff, the defendants handed over the statement signed by the plaintiff to his trade union.

The defendants allege that they were justified in their action (1) because the plaintiff had not fulfilled his promise of assistance, and (2) because they regarded the last letter as in the nature of blackmail. I have already found that the first excuse forms no defence, and I do not think that the threat of publicity justified the disclosure of the statement to the trade union. Secrecy on the plaintiff's part was no part of the bargain, though its necessity was impressed upon him, and in any case I think the plaintiff genuinely believed himself to have a grievance in that he had revealed the method by which the swindle was effected and the names so far as known to him of the perpetrators and had received only a few pounds in return. The defendants do not claim to have been, nor do I think they were, actuated by any motive of public policy. The fact was that they desired to put an end to the plaintiff's capacity to harm them, and they thought that this would best be accomplished without the publicity of a trial by reporting the plaintiff to his trade union, who would deal with the matter by a private tribunal. In this they sought their private advantage, but no doubt some public gain ensued from the breaking-up of the groups instrumental in perpetrating the fraud.

As a consequence of the disclosures the plaintiff was summoned before a meeting of the branch committee of the union on Apr. 6. At the same time a number of other men, including all or nearly all of those whom the plaintiff had implicated, were also summoned. Some discussion took place before me as to the accusation then levelled against the plaintiff. According to his own evidence the chairman told him that he was there to justify the statements he had made against his fellow members, and the letter summoning him gives some support to his assertion. I have no doubt that that was one of the matters discussed, but equally I have no doubt that the question of the plaintiff's own dishonesty was a vital consideration. After hearing the plaintiff and his fellows on Apr. 6, the branch committee continued its deliberations on Apr. 13, and determined to exclude the plaintiff and most of the men accused by him from the union under general rule 24 of the rules of the union. The particular rule in question is rule 24 (2) (f) :

Any member shall be liable to exclusion from the union and shall forfeit all

money paid thereto, if having knowingly acted to the detriment of the interests of the union.

Notice of his expulsion was sent to the plaintiff by letter dated Apr. 28, 1934. The plaintiff put in a notice of appeal from the decision of the branch committee to the executive council, but did not proceed with his appeal. It appears also that he was asked by the branch secretary to send a full account of the case to the general secretary. In consequence of this request he sent a letter dated Apr. 28, which was produced by the branch secretary. It was antagonistic to the success of the appeal and concludes with the words "The only fair and just thing to do is for your society to dissassociate itself from the men whose actions are placing in the utmost jeopardy the interests of all concerned."

Since his exclusion from his union the plaintiff has not earned anything; indeed he was at the time of his exclusion and had for some time before been unemployed. Unless he is reinstated he has lost all benefits from his trade union and all prospect of work in the trade with which he is concerned. This does not necessarily mean total lack of work, but it makes the obtaining of work much more difficult. It also deprives the plaintiff of the possibility of a certain amount of benefit. Whether the defendants be liable or not, there is no doubt that the plaintiff has suffered a serious loss. I estimate it at £400. Certain claims to damages were made in para. 8 of the statement of claim on the ground that the defendants had promised employment to the plaintiff; these were abandoned at the trial and the only question argued was as to his right to recover damages under paras. 6 and 7 of the statement of claim for breach of an agreement not to disclose the statements made by the plaintiff to any third party.

This agreement was eventually treated as a contractual obligation and the questions argued before me were: (1) Was that agreement contrary to public policy and therefore void, and (2) If not, was the damage ensuing to the plaintiff caused by the publication, or by his own wrong and therefore irrecoverable? I should myself read the statement as a confession of a past crime—viz., the obtaining from the *Daily Express* by fraudulent means the sum of £2,000, out of which the plaintiff received £100, and the revelation of the intention once existing to commit a future crime—viz., to obtain the sum of £2,500 by false pretences, an intention which had been implemented to the extent of preparing an entry but not parting with it, and had afterwards been abandoned. So far as the second matter is concerned the plaintiff indicates that he is prepared to reveal the facts and to consider allowing the statement to be used in clearing up the competition muddle generally. I do not think that there is any question of suppressing evidence which would lead to the detection or prevention of a future crime, but undoubtedly the plaintiff made it a condition that his own past criminal

offence should be kept a secret. As I have said, this condition imposed an obligation not to disclose that part of his statement to the police though primarily the intention was to conceal it not from them but from the plaintiff's trade union. Is this provision contrary to public policy so as to make the agreement unenforceable?

Undoubtedly the defendants obtained at the expense of their promise information which they desired, which was useful to them for the purpose of suppressing the fraudulent practices, and which they might not have obtained in any other way. To this extent public policy gained, but on the other hand facts were withheld from the police as the result of which a prosecution or prosecutions might have been instituted. The mere concealment of the commission of misdemeanours, as this was, is not in itself a wrongful act. There is misprision of felony, but no misprision of misdemeanour, nor do I think the promise not to disclose that a crime has been committed is unlawful or against public policy. To pay either directly or indirectly for non-disclosure of a crime is, however, against public policy, and indeed to pay for the non-disclosure of a fact which ought to be communicated to a third party may also be against public policy—e.g., if in the present case the plaintiff had made a promised payment for the non-disclosure to the trade union of his own fraud, such a payment might well affect the course of justice (*Lound v. Grimwade* (1), at p. 605). But there is no question of payment here. There is but a promise to keep information secret in return for the revelation of matters which it was in the public interest that the defendants should know. If all that promise means is that information as to the plaintiff's wrongdoing will not be furnished in the first instance by the defendants to the trade union or even to the police, I see little harm in the promise, but if it means that the defendants will refuse to disclose the information which they have received even if served with a *subpœna ad testificandum* or a *subpœna duces tecum*, I should hold the bargain invalid. Does it mean, as has been said, that the defendants, if summoned to give evidence, must run away (see *Crampton v. Green* (2)), or merely that the information which they have received is not to be used by them in the first instance? Having read the document, I think it bears the second meaning and not the first. The defendants must not, I think, take the initiative in divulging the information and they must not use it against the plaintiff in any way, but in my view there is nothing to prevent them from giving evidence in a court of law if summoned.

This conclusion, to my mind, is not inconsistent with the view of all the Lords Justices in *Weld-Blundell v. Stephens* (3), which was approved by the House of Lords and received considerable support from the judgment of SCRUTTON, L. J., in that case. Like that learned Lord Justice, I feel it to be in accordance with public policy that promises should be kept. Having regard to this view, I have not stayed to consider

whether the evidence furnished by the plaintiff was sufficient to enable a prosecution to be launched, or whether, if a prosecution were launched, the written document could be given in evidence.

My determination leaves open for decision the question much canvassed in *Weld-Blundell v. Stephens* (3) in the Court of Appeal and the House of Lords, whether the damage which followed the defendants' disclosure of the documents was caused by that disclosure or must be regarded as the result of the plaintiff's own wrong. Undoubtedly if, as a result of his own deliberate act of wrongdoing, a plaintiff is compelled to pay damages to a third person, he cannot claim an indemnity or contribution from the person disclosing the wrongdoing, even though that person were under a duty not to disclose. In such a case the act of the person revealing the plaintiff's tort or crime was the occasion and not the cause of the plaintiff's loss. Does the principle go further and say that in such circumstances the plaintiff can recover no kind of loss which he may suffer? I think it does. The wording of the judgments and speeches in the case cited, or the judgment of LUXMOORE, J., in *Bradstreets British, Ltd. v. Mitchell* (4), which follows it, seem to lead to the conclusion that in such a case as the present the defendants did not cause the loss suffered but merely furnished the opportunity for the infliction of a penalty which the plaintiff had brought upon himself. The plaintiff did not lose his trade union ticket because the defendants disclosed his fraud, but because he had been dishonest. I feel the force of the views expressed by SCRUTTON, L.J., VISCOUNT FINLAY, L.C., and by LORD PARMOOR in *Weld-Blundell v. Stephens* (3), but they were in the minority.

The result may be that there is no sanction adequate to compel the defendants in such a case as the present to keep their word, though I think that word should have been kept in spite of the failure of the plaintiff to furnish to the defendant all the information they believed he possessed and expected to receive. It is true that SCRUTTON, L.J., in *Weld-Blundell v. Stephens* (3), and probably the other members of the court, would have granted an injunction restraining the publication (see p. 594), and that in *Bradstreets v. Mitchell* (4), LUXMOORE, J., did grant one; but in most cases that remedy is useless, since disclosure has already been made and the harm done. Such, however, I conceive to be the law, and it follows that the plaintiff is entitled to nominal damages only. I award him 40s., and without costs.

Solicitors: *Kays & Jones* (for the plaintiff); *Lewis & Lewis* (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

CRIPPS *v.* COOPER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parc and Goddard, JJ.), **April 28, 1936.**]

Street Traffic—Motor trailer—Indivisible load of exceptional length—Motor Vehicles (Construction and Use) Regulations, 1931, regs. 62, 85.

Appellant used on the road a motor-drawn trailer loaded with five fir trees, securely fixed, which projected over the back of the trailer for 32 ft. He was convicted at petty sessions for using a trailer in such a condition that danger was likely to be caused, in breach of the Motor Vehicles (Construction and Use) Regulations, 1931, regs. 62, 85. He appealed to quarter sessions on the ground that reg. 51 provides that a trailer may exceed 22 ft. in length if constructed and normally used for the conveyance of indivisible loads of exceptional length; this appeal was dismissed:—

HELD: there was evidence on which the justices could find that the distribution of the load was dangerous to persons on the trailer or on the highway, and therefore the proviso in reg. 51 did not protect the user of the vehicle.

[EDITORIAL NOTE.] The interest of this case lies in the fact that it is the first case upon the modern regulations for the carriage of unwieldy loads on public roads. The regulations make provision for the conveyance of indivisible loads of exceptional length, but the cardinal principle is that there must be no danger to a person on the trailer or to a person on the road.

THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS (S.R. & O., 1931, No. 4.) appear in *STONE'S JUSTICES' MANUAL*, 1936, p. 2113.]

APPEAL by way of case stated by quarter sessions, in respect of a conviction under the Motor Vehicles (Construction and Use) Regulations, 1931, regs. 62, 85.

The appellant was convicted before a court of summary jurisdiction on Aug. 19, 1935, for using a trailer drawn by a motor vehicle on the road in such a condition that the distribution of the load of timber on the trailer was such that danger was likely to be caused to a person on the vehicle or trailer or on the road, contrary to the Motor Vehicles (Construction and Use) Regulations, 1931, regs. 62 and 85. The trailer carried five fir trees from 40 ft. to 58 ft. in length; they were properly loaded and securely fixed. The longest of the trees projected to the extent of 32 ft. 9 ins.

An appeal to quarter sessions was dismissed and the defendant appealed to the Divisional Court against this judgment.

W. Jardine, K.C., and *Cecil Havers*, for the appellant: Purchasers required the trees to be delivered in full lengths. Trees 58 ft. in length have been carried on the road in the manner adopted by the appellant for many years. It is an approved method. There was no evidence on which it could be found that the distribution of the load on the trailer was likely to cause danger to any person on the trailer or on the road, or that the regulations had been contravened. Reg. 51 provides that the

overall length of a trailer shall not exceed 22 ft., an exception being that this provision does not apply to a trailer constructed and normally used for the conveyance of indivisible loads of exceptional length. This load could not be distributed in any different way, and the regulations envisaged a trailer carrying a load of exceptional length.

E. Garth Moore, for the respondent, was not called upon.

LORD HEWART, L.C.J.: This appeal must be dismissed. The appellant was convicted upon an information which charged him that on July 11, 1935, he used a trailer with a motor vehicle and that the distribution of the load upon the trailer was likely to cause danger to a person on the trailer or on the road. Reg. 62 lays down:

Every motor vehicle, every trailer drawn thereby and all parts and accessories of such vehicle and trailer shall at all times be in such condition and the weight, distribution, packing and adjustment of the load of such vehicle or trailer shall at all times be such that no danger is caused or is likely to be caused to any person on the vehicle or trailer or on a road.

The justices were of the opinion that the distribution of the load of timber was such as was likely to cause danger, and the court of quarter sessions, having heard the case afresh, came to the right conclusion. They find as a fact, amongst other things, that the longest of the trees projected over the rear of the trailer for 32 ft. 9 ins.; and also that, if it became necessary to change direction quickly, the load of timber would then have swung across the road; and finally, that the distribution of the said trees on the said trailer was such that danger was likely to be caused to any person on the road. All that seems to me to be pure fact. It follows that if trees of this length carried on the road cannot by human ingenuity be distributed otherwise, they must not be carried on a motor tractor. That being so, the court will not interfere with the decision of the court below.

DU PARCQ, J.: I am of the same opinion for the same reasons.

GODDARD, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Joynson-Hicks & Co.* (for the appellant); *Butcher, Andrews & Savory*, Fakenham (for the respondent).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]



SKILTON v. EPSOM & EWELL URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Swift, J.), April 24, 1936.]

Highways—Repair—Defective traffic stud—Non-feasance—Duty to repair stud not a duty as highway authority.

The plaintiff was riding a bicycle along the highway, when a traffic stud, which had become dislodged, was thrown up by a passing car and struck the plaintiff's bicycle, overturning it. It was found as a fact that the stud had been loose for some three weeks. The defendants had inserted the stud into the roadway under powers contained in the Road Traffic Act, 1930, s. 48 :—

HELD : whether or not the stud formed part of the highway, the insertion of the stud into the roadway was not done as part of the defendants' duty to maintain highways, and the doctrine which restricts the liability of a highway authority to misfeasance and exempts them from liability for non-feasance did not apply. The defendants were liable for the damage sustained by the plaintiff.

[EDITORIAL NOTE.] The point here, though one of some difficulty in solution, is very shortly stated. It is simply this, whether the highway authority is liable for the repair of a traffic stud *qua* highway authority. If it is so liable the authority is not liable for non-feasance, though it is for misfeasance. The decision is that whether the stud is or is not part of the highway it was placed upon the road by the local authority not under any power derived from the Highway Acts but under an Act dealing purely with the regulation of traffic. The highway authority is therefore liable for non-feasance in the matter of repair of traffic studs and traffic signs generally.

AS TO THE REPAIR OF HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 332-337, para. 455, and FOR THE CASES, see DIGEST, Vol. 26, pp. 398-408, Nos. 1239-1291. FOR THE ROAD TRAFFIC ACT, 1930, s. 48, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 646.]

Cases referred to :

- (1) *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256 ; 26 Digest 405, 1274.
- (2) *White v. Hindley Local Board* (1875), L.R. 10 Q.B. 219 ; 26 Digest 412, 1322.
- (3) *Russell v. Men of Devon* (1788), 2 Term Rep. 667 ; 26 Digest 587, 2780.
- (4) *Cowley v. Newmarket Local Board*, [1892] A.C. 345 ; 26 Digest 400, 1251.
- (5) *M'Kinnon v. Penson* (1854), 9 Exch. 609 ; 26 Digest 588, 2782.
- (6) *Gibson v. Preston Corpn.* (1870), L.R. 5 Q.B. 218 ; 26 Digest 357, 834.
- (7) *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93 ; 38 Digest 35, 209.
- (8) *Papworth v. Battersea Corpn.*, [1915] 1 K.B. 392 ; 26 Digest 398, 1239.
- (9) *McClelland v. Manchester Corpn.*, [1912] 1 K.B. 118 ; 26 Digest 404, 1270.
- (10) *Sydney Municipal Council v. Bourke*, [1895] A.C. 433 ; 26 Digest 400, 1254.
- (11) *Pictou Municipality v. Geldert*, [1893] A.C. 524 ; 26 Digest 400, 1252.
- (12) *Tregellas v. London County Council* (1897), 14 T.L.R. 55 ; 26 Digest 403, 1264.
- (13) *Whyler v. Bingham Rural Council*, [1901] 1 K.B. 45 ; 26 Digest 389, 1168.
- (14) *Moul v. Tilling (Thomas), Ltd.* (1918), 88 L.J.K.B. 505 ; 26 Digest 401, 1260.

APPEAL from a decision of the deputy judge of the Epsom County Court, given on Feb. 18, 1936. Defendants were a highway authority.

and as such were empowered by the Road Traffic Act, 1930, s. 48, to place traffic signs—i.e., metal studs—in the Hook Road, Epsom, for the regulation of the traffic. On July 10, 1935, the plaintiff, while riding a bicycle along the road in question, was thrown off and injured by one of a series of traffic studs affixed to, or inserted in, the road becoming loose and being thrown by a passing motor car against her bicycle. The plaintiff brought an action in the county court for damages for personal injuries against the Urban District Council, the ground of the action being the alleged negligence of the defendants or their servants. No evidence was called by the defendants, but it was submitted on their behalf that the traffic stud formed part of the highway and that the evidence had not shown any misfeasance on the part of the council for which alone a highway authority could be held liable.

The learned deputy county court judge found as facts: (i) the defendants were the surveyors of the highway in question; (ii) the plaintiff was injured in the way described; and (iii) the traffic stud which caused the injury had been loose for at least three weeks prior to the accident.

He further decided as a matter of law that the stud did not form part of the highway and that the defendants were liable to keep it in such a state of repair as to prevent its causing damage to a passenger on the road.

The proceedings in the county court are fully reported in [1936] L.J.N.C.R. 69.

The defendants appealed.

Charles Doughty, K.C., and *W. B. Franklin*, for the appellants: The deputy county court judge was wrong in law in holding that the traffic stud was not part of the highway, and that the appellants were liable to pay damages to a person injured by their having failed to keep it in repair. They could only be liable in damages for misfeasance. There was no evidence that it had not been properly fixed when first put in the road. The 1930 Act placed no new class of duty on a highway authority which in any way altered the law as to misfeasance and non-feasance. Obelisks or refuges in a road and the kerbstones are placed there to regulate the traffic. The doctrine of non-feasance applies to these and to the modern traffic studs.

[He referred to: *Russell v. Men of Devon* (3), *Cowley v. Newmarket Local Board* (4), *Pictou Municipality v. Geldert* (11), *Papworth v. Battersea Corporation* (8), *Tregellas v. London County Council* (12).]

Eric White (Tristram Beresford, K.C. with him), for the respondents: The deputy county court judge was right in holding that the stud was not part of the highway. The studs were not necessary for the maintenance of the road, but were merely a contrivance for the regulation of the traffic. The Road Traffic Act, by sect. 48, permitted the highway

authority to place traffic signs on or near the road, but they did not become part of the highway. The defective stud amounted to a nuisance as in the case of *Bathurst Borough v. Macpherson* (1). For allowing the stud to become defective the defendants were guilty of misfeasance, as in *Whyler v. Bingham Rural Council* (13).

Doughty, K.C., in reply: In *Moul v. Thomas Tilling, Ltd.* (14), the doctrine of non-feasance was held to apply to the case of wooden paving blocks which had become defective. There is no logical reason why the doctrine should not equally apply to the case of a traffic stud. The case of *Bathurst Borough v. Macpherson* (1) was really a case of misfeasance, and it is no authority for the proposition that the council is liable for non-feasance.

SLESSER, L.J.: This is a difficult case, and as Mr. Doughty has very properly reminded us, an important one; but as the court has come to a clear conclusion, we have not thought it necessary to reserve judgment.

The facts of the case are these. On July 10, 1935, the respondent, Mrs. Skilton, was going along the Hook Road from East Street in the area where the Epsom and Ewell Urban District Council are the highway authority, and she was upon a bicycle. She was passing a part of the road where there is in the middle of the road for the purpose of directing the traffic what has been called a line of studs. She was by the kerb about two or three feet away, a car passed her, and as the car passed over one of these studs it dropped from the car on to the road and knocked her front wheel, and she fell off her bicycle and sustained injuries. For these injuries she now brings an action for damages against the local authority, the Epsom and Ewell Urban District Council.

Two persons were called on her behalf to say that the stud had for some time been in a defective condition. A Mrs. Drew, who lives in Hook Road, and who saw the accident, said a stud used to rattle when the traffic went by. She could not say how long. She also said that she had seen the stud wobble; and a Mr. Drew, who also lived in Hook Road at the time of the accident, said that he knew that it wobbled, his attention had been directed to it, and he noticed it loose first on Derby Day. It was the second stud from the end. That was the evidence. The defendants called no evidence. The learned judge accepted the evidence of those witnesses, and came to the conclusion in his judgment that the stud had been in a dangerous condition for at least three weeks. He uses this phrase: "Two witnesses for the plaintiff, however, satisfied me that it"—that is, the stud—"had been in a loose (and therefore, in my view, a dangerous) condition for at least three weeks." That statement of the facts really concludes, I think, the material facts which we have to consider. But on them arise difficult questions of law. First of all the learned judge applied his mind to this

question : Did the studs form part of the highway ? He came to the conclusion that the stud was an artificial work distinct from the highway, and he quotes from SIR BARNES PEACOCK in *Bathurst Borough v. Macpherson* (1), at p. 265, to the purpose that :

a duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway, which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose.

On that finding, the learned judge came to the conclusion that the accident was due to the negligence of the defendants. For reasons which will appear hereafter, I doubt very much, with every respect to the learned judge, whether a conclusion that the stud was not a part of the highway is necessarily decisive of the problem which has to be decided in this case. I am not prepared, speaking for myself, to express a final opinion whether physically this stud was or was not a part of the highway. We have not seen the stud in question. We do not know exactly how it was fixed to the highway, or exactly what its construction was, whether it justifies the description which the learned judge applies to it, quoting the case which I mentioned of *Bathurst Borough* (1), that it is an artificial work ; but be that as it may, I will assume for the purposes of this case that the stud may properly be said to be physically a part of the highway. The problem has arisen before in various ways in connection with grids over open drains, manholes, and the like. Questions have frequently arisen in the courts whether some work which covers up a hole in the highway can or cannot possibly be said to be a part of the highway. In one case, in the case of *White v. Hindley Local Board* (2), the plaintiff was driving along a highway under which was a sewer, and his horse trod on a grid or grating put there to drain the surface water off the road into the sewer, and BLACKBURN, J., in asking the question : is the grid part of the sewer or part of the highway, expresses the opinion that possibly it is part of both. As I say, I do not think it necessary in the view I take of this case to decide whether the learned judge was or was not right in coming to the conclusion that this stud was not part of the highway ; but assuming that the stud in one sense—in the physical sense—was part of the highway, it was certainly on the highway when the difficult questions of law which have been argued before the court began to arise, and I think arise in the following way.

The question which has to be decided by the court is this, essentially. Have the defects caused a nuisance in the highway ? If they have caused a nuisance in the highway, it may be that they are responsible to that individual who has been injured as a consequence of that nuisance ; but there is an important exception to the general principle of liability for nuisance in an action. In the case of the maintenance of highways,

for a very long time indeed—in fact the law knows no view to the contrary—it has been held that a local authority who are the highway authority are not responsible for the mere non-repair of the highway. It is not necessary for this purpose, though the matter appears in some of the older abridgements, to go further back than the case of *Russell v. Men of Devon* (3), in which I think the side-note expresses accurately the view of the court :

No action will lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair.

Now, in that case it was pointed out by the court that the difficulty which would arise in suing the inhabitants at large would be primarily a procedure difficulty. It would have been productive of an infinity of actions. It was pointed out that where liability has been successfully laid it has been in cases where the authority was an authority in the nature of a corporation or *quasi*-corporation, and not in such a case which was against the inhabitants at large ; and that authority, as I say, has not been doubted. But the problem has arisen since that time whether the subsequent legislation which has vested the responsibilities and powers to maintain the highway not in the inhabitants at large, but in the surveyor of highways, and subsequently in local authorities who have inherited his duties and his powers, has made any difference to the view as expressed in the case of *Russell v. Men of Devon* (3), that the authority—at that time the inhabitants—were liable for the non-repair of the highway otherwise than by way of indictment. It is not necessary in my opinion, for the purposes of this case, to consider all those cases, but one must come immediately to the leading case of *Cowley v. Newmarket Local Board* (4), to the effect that although the powers and liabilities of the surveyors of highways, which they had inherited from the inhabitants of the county or hundred at large, have been vested by the Public Health Act in an urban board as the local authority for the district, the principle expressed in the earlier cases still obtains.

LORD HERSCHELL points out at page 353 :

It was held as long ago as the case of *Russell v. Men of Devon* (3), that an action could not be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair. This decision was, no doubt, largely, but it was not exclusively, founded on the fact that the inhabitants of the county are not a corporation, and cannot be sued collectively. In the subsequent action of *M'Kinnon v. Penson* (5), brought against the county in the name of their surveyor for a similar cause, it was urged that the 43 Geo. 3, c. 59, s. 4, which enacted that the county might be sued in the name of their surveyor, had removed the only difficulty in the way of the plaintiff. It was held, however, that the effect of the statute was not to create a new liability, but only a more convenient method of enforcing existing rights.

Then he cites another case, and then he cites *Gibson v. Preston Corpora-*

tion (6), which was to the like effect, because the corporation there had become the highway authority as well as the municipal authority at large ; and there again they were similarly held not liable for the non-repair of the highway.

I do not think really any difficulty arises at all, and we conceive that if this were the case merely of the non-repair of the highway, either in carrying out their duties at common law or carrying out their duties imposed upon them by the Highway Act or any other legislation, there can be no finding but that this lady must fail if this was in fact part of the highway ; but, notwithstanding Mr. Doughty's statement that no action has ever been allowed to succeed on such a case against the highway authority before—an observation which I think is not quite accurate, for reasons I will hereafter give—I have come to the conclusion that it would be wrong in this case to come to the conclusion that the insertion of this stud into the road under the powers which the local authority have to insert it can in any way be said to be an act connected with the maintenance or the repair of the highway as such. To explain why I have come to that conclusion, I find it necessary to look to the Acts which enable the local authority to insert the traffic signs, as they are called, or to place them on the highway.

Power is given under the Road Traffic Act, 1930, s. 48. Now, the Road Traffic Act as such has nothing to do, so far as we are here concerned, with the maintenance of the highway whatever. It is an Act to make provision for the regulation of traffic on the road, and of motor vehicles, and otherwise ; and in Part III, which is said to be an amendment of the law relating to highways, sect. 48 in fact gives power to the highway authority, as defined in that section and in the Act, to cause or to permit traffic signs to be placed on or near any road in their area. It is not confined to a power to place traffic signs in the road. Those traffic signs are to be of a precise size, colour, and type, and after the commencement of the Act, no traffic signs shall be placed on or near the road except in accordance with those two preceding provisions. But the Act appears to contemplate, and the section I think makes it clear, that this power to erect signs is not limited to what generally would be called at common law a highway authority, being an authority which derives its powers or duties of maintenance or repair from the inhabitants at large or from the surveyor of highways. There is a definition of a "highway authority" to be found in sect. 121 which applies to the Act generally, and that is that a highway authority

in relation to any road, means the authority (being either the council of a county, the council of a county borough, the council of an urban district, the common council of the City of London, or the council of a metropolitan borough) which is responsible for the maintenance of the road.

Now, that in general would include, or would be apt to include, just those

highways powers which they have derived from the old surveyor of highways, and in sect. 48 the legislature is at pains to extend the definition, and gives a further definition, saying :

(9) In this part of this Act, the expression " traffic sign " includes all signals, warning sign posts, direction posts, signs, or other devices for the guidance or direction of persons using roads ; and in this section the expression " highway authority " includes any person responsible for the maintenance of a road.

Then in the proviso to subsect. (3), which is the subsection saying that no traffic sign shall be placed on or near any road except in accordance with the provisions of the section, it says :

Provided that nothing in this subsection shall apply to any notice in respect of the use of a bridge or to any traffic sign placed by the owners or workers of any tramway, light railway, or trolley vehicle undertaking, any dock undertaking or any harbour undertaking in pursuance of powers conferred by any special Act of Parliament or order having the force of an Act.

So that there can be cases, as appears clear from the subsection, where the highway authority, having authority to place traffic signs, will not be an authority deriving its powers from the old surveyor of highways or from the inhabitants at large, but may be an authority like a dock authority having special powers for regulating its area conferred upon it possibly by a private Act or otherwise ; and in such cases, as is shown in the authority of the *Mersey Docks Trustees v. Gibbs* (7), and other cases to the like effect, this doctrine of the absence of liability for the non-repair of highways does not apply, and it may be that in such cases, as in the case of the *Mersey Dock Trustees* (7), a body may be made liable for producing a nuisance where they invite people on to their area or where they are required by statute to enable people to use that area. In other words, it appears to me clear, from the very definition of a highway, in sect. 48, that that definition is dealing both with highways which are old highways under the old authority of the surveyor, highways which may be used by dock authorities, and also any other kind of highways which may arise by tender or dedication, or in any other way, the language being, " any person responsible for the maintenance of the road." Approaching the matter from that point of view, it looks to me that it never was the intention of this legislation in any way to treat the placing of these traffic signs on this road as any part of the maintenance of a highway repairable or maintained at common law. It is dealing with any kind of road the maintenance of which is made the responsibility of any person.

Passing from that consideration, one has next to consider a series of authorities which have dealt with the problem when a person is injured by anything defective on the highway for which the responsibility of

maintenance is not in the highway authority as such. For this purpose it is not necessary, in my view, to consider all the authorities. *White v. Hindley Local Board* (2), which was mentioned by the learned county court judge in his judgment is a good example. That was a case where :

As the plaintiff was riding along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface-water off the road into the sewer. The grid being in a defective state gave way, and the horse's leg was injured. Plaintiff brought an action against the local board of health of the district, who are the surveyors of the highway, by sects. 68, 117, of 11 & 12 Vict. c. 63, and in whom also the sewers are vested under sects. 43, 45 :

Held, that, though the defendants might not be liable as surveyors of the highway, they were liable as owners of the sewer, of which the grid formed part, for negligence in not keeping the grid in a proper state.

Another authority to the like effect, a recent one, is the case of *Papworth v. Battersea Corporation* (8), and there are a number of other cases to the same effect. It is said in *Papworth's* case (8), that *White v. Hindley Local Board* (2) was followed.

Now, as to those cases Mr. Doughty says, "Well, that may well be the case, but there, although the authority was both the highway authority and the drainage authority, still they were being held liable only in their capacity of drainage authority." In my view, that is not a distinction which can be made when the principle to be considered is examined. The question is not, in my opinion, whether the body which is sought to be made liable for non-reparation is or is not the same body as that which is responsible for the maintenance of the road, but whether the particular alleged nuisance or injury which they have permitted is one which they have done in their capacity as repairers of their road, or in their capacity in carrying out the obligations or the powers of some quite different statute ; and from that point of view it matters nothing whether the authority does or does not perform some action. It has been pointed out in this very statute (sect. 48) that the highway authority, so called, has power under this section to erect traffic signs near a highway which may not be concerned in any way with the highway as such, but in truth and in fact I differ respectfully from Mr. Doughty where he says there is no authority on this point ; I think there is, and I think that is to be found in *Bathurst Borough v. Macpherson* (1). It is a decision not binding upon us, being one of the Privy Council, but it is naturally one to which we would pay the very greatest respect. There one authority had a duty under one specific Act, namely, the local Act of the Dominion from which the appeal was brought, to construct a street and maintain it, and also they were responsible for the drains, gutters, or sewers. A man who was riding in the road passed over a barrel drain which had been lined in brickwork, and the brickwork had given away, and not having been repaired, a hole was caused

into which the plaintiff's horse fell, carrying the plaintiff with him, crushing the plaintiff's leg against one side of the hole and causing a compound fracture of the leg. In an action claiming damages against a municipality (a) for negligence in constructing the street; (b) for negligence in keeping and maintaining the street and not repairing the drain, gutter, or sewer, the Chief Justice came to the conclusion that such a case was governed by the principles of the *Men of Devon* (3)—it was before the decision in *Cowley* (4)—

In his summing-up, the Chief Justice directed the jury that the defendants, under the Act of Incorporation, were not liable for the result of any mere non-feasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance, but if they constructed the sewer properly in the first instance, and it became defective afterwards, they were not bound to repair it.

That view was appealed, and it was held to be a mis-direction, for it was said that the barrel drain was not only made by the defendants, but the sole control and management of it were by statute vested in them, and by reason of their construction of the drain and their neglect to repair it they had caused a nuisance in the highway for which they would be liable on indictment and were liable to action by the plaintiff. Now, that case rests upon the view that where a nuisance has been created, a person may have a remedy for damages suffered by that nuisance when it is something more than the mere failure to repair the highway; and the later case of *McClelland v. Manchester Corporation* (9) seems to me another authority for my opinion.

Now, it seems to me that placing a stud upon this road in such a manner that it became defective and was not repaired, notwithstanding that, as the learned judge found, it had been defective for three weeks, did amount to placing a nuisance upon the highway. The learned judge has come to the conclusion that this knowledge that this stud had been loose and therefore dangerous for at least three weeks ought to have come to the defendants' knowledge if they and their servants had exercised ordinary care and diligence which it was their duty to do. In other words, in exercising their power, albeit they were the highway authority, not as the highway authority but to direct the traffic, they brought on to that road a dangerous thing which they did not take precautions to maintain in a safe condition, they cannot take advantage of the cases which have dealt with the maintenance of the highway, because this stud was not on the road, whether it was part of the highway or not, for any purpose of the maintenance of the highway, but for the purpose of traffic direction under the Road Traffic Act which gives power, as SWIFT, J., pointed out in the course of the case, to the authority to bring criminal proceedings if it were disobeyed. The mere fact that it may have been on the highway in this particular case and not elsewhere

where there is power to make it, does not, in my opinion, make this act of putting in the stud a part of the maintenance of the highway at all ; it is a case essentially the same as *McClelland's* (9) of bringing a nuisance upon the highway, in which case the authority are responsible if that which by its nature may be dangerous is by want of proper maintenance and by want of proper reparation brought into such a dangerous condition as to cause injury to a passer-by on the highway.

For these reasons, which do not quite accord perhaps entirely with those given by the learned county court judge, I am of opinion that this appeal fails, because, as I have said, this act done by this authority was not done under the Highways Acts at all ; it was done for a different purpose under a different power, and the cases dealing with immunity for non-feasance for repair of the highways have no application to this case and cannot excuse the appellants.

ROMER, L.J. : I agree. This case was presented to us by Mr. Doughty as one in which an attempt was being made to render the highway authority liable for non-repair of the highway. Since the decision of the House of Lords in *Cowley v. Newmarket Local Board* (4), and indeed I think long before that, any such attempt must necessarily fail. I do not so regard this action. Like SLESSER, L.J., I refrain from expressing any concluded view as to whether the stud which flew from its position on the roadway and injured the plaintiff was or was not part of the highway. For the purpose of my decision I am willing to assume that it was. Nevertheless, I think the defendants have been rightly made liable for the damage caused to the plaintiff, and for this reason, that they have done something on the highway not for the purpose of maintaining it as a highway, but for some totally different purposes, and what they did had at the time the injury was caused to the plaintiff become and resulted in a nuisance to the highway, and for such a nuisance the defendants were, in my opinion, properly made liable, notwithstanding the fact that they are also the highway authority.

There is, I think, ample authority to be found in the books for the proposition that a person causing a nuisance in the highway of such a nature may be held liable although he happens also to be a surveyor of highways or other highway authority. SLESSER, L.J., has referred to some of those cases. In particular he has referred to the decision of the Privy Council in the case of *Bathurst Borough v. Macpherson* (1). There the Municipality of Bathurst were held liable for something that they had done on the highway which was properly done at the time it was done, but by reason of neglect on their part had gone into such a state that it occasioned a nuisance to the highway. They were held liable although they happened also to be the highway authority. Now, commenting on that case, LORD HERSCHELL, L.C., in delivering the judgment of the Privy Council in the case of the *Sydney Municipal Council*

(10), in which the doctrine laid down in *Cowley v. Newmarket Local Board* (4) was affirmed and acted upon in relation to the *Bathurst* case (1), says this :

The *ratio decidendi* was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become foundrous. If any person other than the defendants had lawfully made the drain, and the same result had ensued, such person would undoubtedly have been liable just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the municipality were or were not bound to repair the highway. The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them and certain powers or duties in relation to its repair are committed to them ?

Here the defendants, as I understand it, made a series of holes in the highway not for the purpose of maintaining the highway at all, but for the purpose of inserting in those holes a certain number of studs. They did not take steps to see that those studs remained at all times in the position in which they had been placed. One of the studs came out, and it appears to me that the defendants are just as liable in those circumstances as though they had dug a hole in the highway and had omitted to fill it up. The act they did was not an act done in pursuance of their duties to maintain the highway, but in pursuance of powers conferred upon them by the Road Traffic Act, 1930.

For those reasons, in addition to those which have been given by the Lord Justice, I agree that this appeal fails.

SWIFT, J. : I entirely agree with the reasons which have been given by the two judgments which have just been delivered, and I have only one word to add. On the one hand we have been asked to apply in this case the principles laid down in *Russell v. Men of Devon* (3), and on the other hand we have been asked not to extend that principle. In my view, we neither apply it nor extend it. We have nothing to do with it. The principle of *Russell v. Men of Devon* (3) is that a highway authority as such is only responsible for the damages to a user of the highway for misfeasance, and not for non-feasance. This decision interferes in no way with that principle. That principle has been questioned more than once since 1788, and how long it will be allowed to continue a principle of the law of this country, I do not know ; but there it is, and we do not interfere with it. But it is quite clear to my mind that a

highway authority can, quite apart from failure to repair the highway, be guilty of misfeasance, or may be guilty of creating a nuisance, and I am satisfied on the evidence here that they did create a nuisance which damaged the plaintiff, and I think the county court judge's judgment was right. I agree that this appeal ought to be dismissed.

Solicitors : *Reid, Sharman & Co.* (for the respondent); *William Charles Crocker* (for the appellants).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*

LIVERPOOL CORPORATION AND OTHERS *v.* LANCASHIRE COUNTY COUNCIL AND OTHERS.

[CHANCERY DIVISION (Luxmoore, J.), February 18, 19, 21, April 22, 1936.]

Local Government—Local taxation licences—Distribution of proceeds between county and county boroughs—Local Government Act, 1929 (c. 17), s. 85 (5).

An order was made in 1891 which provided for the equitable distribution of the proceeds of local taxation licences and certain grants between the Lancashire County Council and the councils of certain county boroughs. By the operation of the Local Government Act, 1929, the grants were discontinued, but the proceeds of the local taxation licences remained distributable. The question was raised by special case whether upon the proper construction of the Local Government Act, 1929, s. 85 (5) the order ceased to have effect altogether or only so far as it related to the discontinued grants:—

HELD: the proper construction of the subsection was that it required a new agreement to be entered into in the manner therein prescribed.

[EDITORIAL NOTE.] This case turns upon the construction of a section in the Local Government Act, 1929, and is practically confined thereto. The only general inference that might be drawn from the case is that where an agreement has been come to as to the distribution or sharing out of a composite fund, if a part of that fund ceases to exist, then the agreement for distribution *prima facie* requires to be renewed if the balance of adjustment is disturbed by the withdrawal of the part from its operation.

FOR THE COLLECTION AND RETENTION OF LOCAL TAXATION DUTIES, see HALSBURY, 1st Edn., Vol. 19, Local Government, p. 350, para. 750, and FOR THE LOCAL GOVERNMENT ACT, 1929, s. 85, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 10, p. 937.]

SPECIAL CASE stated for the opinion of the court. These proceedings were originally commenced by an action for a declaration but the parties concurred in stating the questions of law arising in a case for the opinion of the court.

The material parts of the pleadings and the case are fully referred to in the judgment.

Sir Stafford Cripps, K.C., H. P. Glover, K.C., G. Granville Slack, and Kenneth Diplock for the plaintiffs.

Tyldesley Jones, K.C., and Ralph Etherton for the defendants.

LUXMOORE, J.: On Nov. 15, 1935, the Liverpool Corporation instituted an action against the Lancashire County Council claiming a declaration "that notwithstanding the provisions of the Local Government Act, 1929, an order dated Oct. 21, 1891, of the commissioners appointed in pursuance of the Local Government Act, 1888, ss. 32 and 61, determining the equitable adjustment respecting the distribution of the Local Taxation Licences and Probate Duty Grant (as respectively defined in the said Act) as amended from time to time by reason of various alterations of boundaries and the constitution of new county

boroughs has since March 31, 1930, continued to be operative and will continue to be operative (unless and until a new financial adjustment is made pursuant to the Local Government Act, 1888, s. 32, (6)) in respect of local taxation licences included in the equitable adjustment made by the said order and not discontinued by the Local Government Act, 1929." The writ also claimed that the rights of the parties under the 1891 order might be declared. To avoid unnecessary expense the parties on July 29, 1935, concurred in stating a special case for the opinion of the court. The questions propounded for that opinion are :

(a) Whether the said order of 1891 amended as before stated has since Apr. 1, 1930, continued and continues to be operative and binding upon the plaintiffs and defendants with respect to the proceeds of the local taxation licences which remain leviable by the said councils or (b) Whether the said order of 1891 as so amended ceased to have effect as from Apr. 1, 1930, not only with respect to the discontinued grants comprised therein, but also with respect to the proceeds of the said local taxation licences so leviable by the said councils, and in such event (c) Whether a new financial adjustment of the proceeds of the said local taxation licences leviable by the said councils is necessary and ought to be made in the manner provided by sect. 85 of the said Act of 1929.

It will be observed that the second question propounded is merely the negative form of the first question. So far as the third question is concerned Sir Stafford Cripps on behalf of the Liverpool Corporation admitted at the Bar that if the answer to the first question should be in the negative then the third question must be answered in the affirmative. It was further agreed that if the court should answer the first question in the affirmative judgment should be entered for the plaintiffs, but if the answer should be in the negative, and in consequence a new equitable adjustment of the proceeds of local taxation licences is necessary, then judgment should be entered for the defendants with such declaration as the court may think appropriate. The costs of the action and special case are to follow the event.

The special case was argued before me on Feb. 18, 19 and 21 last. After the arguments had concluded it seemed to me that a question of jurisdiction arose owing to the fact that a number of county boroughs which are affected by the 1891 order were not parties to the action or to the special case, although the decision of the questions raised must of necessity affect their respective rights. To avoid any difficulty on this head I directed that the proceedings should be amended by adding as a party each of the sixteen other county boroughs concerned either as co-plaintiffs with the Liverpool Corporation or as co-defendants with the Lancashire County Council and that for this purpose the wishes of each county borough council should be ascertained. In pursuance of my direction the writ and special case were amended on Mar. 31, 1936, by adding as co-plaintiffs with the Liverpool Corporation the Manchester Corporation and the County Borough of Salford, and as co-defendants

with the Lancashire County Council the county boroughs of Barrow-in-Furness, Blackburn, Blackpool, Bolton, Bootle, Barnsley, Bury, Oldham, Preston, Rochdale, St. Helens, Southport, Stockport, Warrington, and Wigan. On Apr. 3, 1936, I was informed that none of the parties added by amendment desired to submit to the court any further argument and that each was desirous of having the questions submitted by the special case determined upon the arguments put forward on behalf of the Liverpool Corporation and the Lancashire County Council respectively and of being bound by such determination subject only to the right of any party to appeal therefrom.

The 1891 order was made by the commissioners appointed under the Local Government Act, 1888. That Act established a new unit of local government by the constitution of county councils in every administrative county in England and Wales and directed that for the purposes of the Act each of certain boroughs specified in the third schedule thereto should be deemed to be an administrative county of itself and to be situate within the county named in the same schedule. Each of these boroughs is referred in the Act as "a county borough." The corporations of Liverpool and Manchester and each of the county boroughs now parties to this action, except the boroughs of Blackpool, Southport and Warrington, are mentioned in the schedule. All of these county boroughs so mentioned, except the borough of Stockport, is to be deemed to be within the county of Lancaster, while the borough of Stockport is to be deemed to be within the counties of Chester and Lancaster. The Act regulated the financial relationship to exist after Mar. 31, 1888, between the Exchequer and the county boroughs and the county within which they are to be deemed to be and the contributions to be made by each to the union officers.

The material provisions in respect of these matters are to be found in sects. 20 to 27 inclusive. They are as follows: (a) the Inland Revenue Commissioners are to pay into the Bank of England to an account to be called the Local Taxation Account such sums as might be ascertained as therein provided to be the proceeds of the duties collected by those commissioners in each administrative county in England and Wales on the licences specified in the first schedule to the Act which are therein referred to as Local Taxation Licences and that the amounts so ascertained to have been collected in each county in respect of local taxation licences should be certified by the said commissioners and paid out of the Local Taxation Account to the council of such county. (b) The said commissioners shall pay into the Local Taxation Account such sums as might be ascertained as therein provided to be four-fifths of one-half of the proceeds of the sums collected by them in respect of probate duties as therein defined. (c) The sums so paid to the Local Taxation Account in respect of probate duties therein referred to as the

probate duty grant should be distributed among the several counties in England and Wales in proportion to the share which the Local Government Board should certify to have been received by each county during the financial year ending the Mar. 31, 1888, out of the grants theretofore made out of the Exchequer in aid of local rates which would cease to be paid after the passing of that Act. (*d*) That all sums from time to time received by a county council in respect of (i) the duties on the local taxation licences whether collected by the Inland Revenue Commissioners or by the county council, and (ii) the probate duty grant should be paid to the county fund and carried to a separate account therein referred to as the Exchequer Contribution Account and be applied as and in the order therein provided. Sect. 24 of the Act contained a recital to the effect that the grants theretofore made out of the Exchequer in aid of local rates (therein referred to as local grants) would, by reason of the duties on the local taxation licences and the probate duty grant being made payable by the Act to local authorities, cease and provided (i) for the repeal of so much of any enactment which required or authorised payment out of the Exchequer of any local grant in substitution for which the county council was required by that Act to make any payment, and (ii) for the payment by the council of each county out of the county fund and the charge to the Exchequer Contribution Fund of the sums in that section specified being sums payable to the Guardians of the Poor and their local authorities or transferable to particular accounts of the county fund. Sect. 32 of the Act provided, among other things, by subsect. (1) that :

An equitable adjustment respecting the distribution of the proceeds of the local taxation licenses, and probate duty grant, and respecting all other financial relations, if any, between each county, and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement, by the commissioners appointed under this Act ; and such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and save as provided by this Act, any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment.

By sub-sect. 3 :

In such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant, as provided by this Act, and to the amount of benefit and

value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider.

The rest of the subsection is immaterial so far as the questions to be decided in this case are concerned. Subsect. (6) says :

Provided that at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable, and that the councils are unable to agree on a new adjustment, the board shall appoint an arbitrator ; and such arbitrator shall proceed to make a new equitable adjustment as if he were the commissioners under this Act, and the provisions of this Act shall apply accordingly. Any new adjustment made by agreement, or by the award of an arbitrator under this section, may, after the expiration of five years from the date of such agreement or award, be altered either by agreement or by arbitration as above mentioned.

Sect. 62 of the Act provided, among other things, by subsect. 1 that :

Any councils and other authorities affected by this Act or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum, or of a terminable annuity for a period not exceeding that allowed by the commissioners under this Act or the Local Government Board.

The 1891 order was made by the commissioners appointed under the Act and was directed to the Lancashire County Council and the county boroughs which are respectively parties to this action, except the boroughs of Blackpool, Southport and Warrington, which were not then in existence. The 1891 order directed that the aggregate proceeds of the Local Taxation Licences and probate grants payable out of the Local Taxation Account should, as between the Lancashire County Council and the respective county boroughs to whom it was directed, be distributed by way of equitable adjustment as was therein provided.

Subsequent to the making of the 1891 order and before the coming into force of the Local Government Act, 1929, the 1891 order was from time to time amended in order to meet the circumstances resulting from the extension of the county boroughs to which it was directed or some of them, and from the constitution of the Boroughs of Blackpool, Southport and Warrington as new county boroughs. In consequence of such amendments the aggregate proceeds were immediately before

Apr. 1, 1930, distributable by way of equitable adjustment between the Lancashire County Council and the respective county boroughs which are parties to this action in the manner set out in para. 9 of the special case. By the Finance Act, 1894, s. 19, a portion of the proceeds of the estate duty derived from personal property was substituted for the probate duty grant and by the Finance Act, 1907, s. 17, it was enacted among other things, that the Estate Duty Grant under the Finance Act, 1894, s. 19, should, instead of being charged in the manner provided by the Acts relating thereto be charged on and paid out of the Consolidated Fund or the growing produce thereof (subsect. (1)) and that the proceeds of the duties on Local Taxation Licences, including any duty chargeable under the Locomotives on Highways Act, 1896, s. 8 (1) should be paid into the Exchequer, instead of into the Local Taxation Account, and that there should be paid out of the Consolidated Fund into the Local Taxation Account a sum equal to the amount which would have been paid into the last-mentioned account as the proceeds of the said duties if that Act has not been passed. By the Finance Act, 1908, s. 6, as amended by the Finance Act, 1921, it was provided that the power to levy the duties on local taxation licences specified in the section should be transferred to county councils in England and Wales as from a date to be fixed by Order in Council, and that the Finance Act, 1907, s. 17, should, as from that date, cease to apply to such duties or the proceeds thereof. The section expressly provided that the transfer should not affect any equitable adjustment respecting the distribution of the proceeds of the local taxation licences made under the Local Government Act, 1888, or otherwise, but directed that provision might be made by Order in Council for any alteration which might appear to be necessary or expedient in consequence of the transfer in the procedure for making payments or otherwise giving effect to any such adjustment.

By Order in Council (S.R. & O., 1908, No. 844) it was provided that the date of the transfer should be Jan. 1, 1909. The said order provided by clause 8 that :

If on the determination, according to any equitable adjustment, of the share of any county in the Estate Duty Grant, the proceeds of the Local Taxation Licence Duties, and the sums which in pursuance of the Finance Act, 1907, are paid in lieu of those duties, and the Local Taxation (Customs and Excise) Duties, in respect of any financial year, it shall be found that the sum actually received in respect of that year by any county exceeds the share of that county, the amount of such excess shall be paid by the council of that county to the council of the county entitled to receive the same. In case of dispute as to the share of any council according to any such adjustment in the said grant, duties, and sums, an appeal may be made to the Local Government Board and the decision of that Board on any such appeal and on any matter or question which is in their judgment incident thereto or consequent thereon shall be final and conclusive.

By the terms of the said order the expression "county" included "county borough" and the expression "council of a county" included "council of a county borough." By virtue of the joint operation of the Finance (1909-10) Act, 1910, s. 88, the Revenue Act, 1911, s. 18, and the Roads Act, 1920, s. 2, fixed sums became payable out of the consolidated fund into the Local Taxation Account in respect of the duties on certain licences, among those Local Taxation Licence Duties, payable to the Local Taxation Account instead of the actual proceeds of such duties, with the result that immediately before Apr. 1, 1930 (the date on which the provisions of the Local Government Act, 1929, relevant to this case came into operation), the monies affected by the 1891 order and the adjustment effected thereby were (a) the produce of the Estate Duty Grant, (b) the sums payable under the Finance Act, 1907, and other Acts in respect of Local Taxation Licences not collected by county and county borough councils, and (c) the proceeds of the Local Taxation Licences collected by the Lancashire County Council and the councils of the several county boroughs which are parties to this action. The majority of the amounts mentioned under these headings vary from year to year. On Apr. 1, 1930, there was no application pending by any of the parties to this action to vary the financial adjustment provided by the 1891 order as from time to time amended, and the adjustment effected by that order as so amended was accepted up to that date by all the said parties as a fair and equitable adjustment under the conditions prevailing before that date of the proceeds of such of the Local Taxation Licences and Probate Duty Grant or the Estate Duty Grant substituted therefor and for the other grants affected by such adjustment. The Local Government Act, 1929, transferred to the councils of counties and county boroughs the powers and duties of the poor law authorities, as defined in the Act, and to county councils the powers and duties of rural district councils in respect of highways and of urban district councils in respect of classified roads. The said Act also made provision for a new system of grants in aid of local authorities. These grants are generally known as block grants because they are not appropriated to any particular service. Sect. 85 of this Act provided that (a) the grants payable out of the consolidated fund into the Local Taxation Account and (b) the grants in aid of certain health services should, with certain other grants, cease to be payable in respect of any period after Mar. 31, 1930. The grants which so ceased to be payable are referred to in the Act as "the discontinued grants." The section also provided that the Local Taxation Account and the Exchequer Contribution Account of every county or county borough should be wound up as soon as might be after Apr. 1, 1930. By subsect. (5) it provided that :

Where, immediately before the appointed day [that is Apr. 1], there is in force a

financial adjustment between any spending authorities with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect, and if and so far as, having regard to the exchequer grants payable under this part of this Act, any new financial adjustment is necessary, a new financial adjustment on an equitable basis shall be made by agreement between the spending authorities, or, in default of agreement, by a single arbitrator appointed by the Minister.

Sect. 86 provided for the payment out of the Exchequer of an annual contribution towards local government expenses in counties and county boroughs to be called the General Exchequer Contribution. These are the grants usually known as block grants to which I have already referred. By sect. 88 these block grants are to be apportioned amongst the several counties and county boroughs in proportion to their weighted populations subject as is stated in the last-mentioned section. Provision is made by sects. 90 and 96 of the Act for additional Exchequer grants to the councils of counties and county boroughs. Sect. 105 provides that all sums received by a county council (which does not include a county borough council (see the definition of "county" contained in sect. 134)) by way of general or additional exchequer grant or of proceeds of local taxation licence duties should be applicable to general county purposes. By virtue of sect. 137 and Sched. 12, Part VI, of the Act, sects. 21 to 27 of the Local Government Act, 1888, are repealed in their entirety and sect. 32 of the last-mentioned Act is stated to be repealed "so far as it relates to the discontinued grants."

The question to be determined is whether the 1891 order has had any and what effect since Apr. 1, 1930. The order effected an equitable adjustment between the parties bound by it in respect of an aggregate sum made up in the main of the duties on Local Taxation Licences and the Probate Duty Grant which was subsequently replaced by the Estate Duty Grant. The adjustment was presumably made after taking into consideration the totality of the payments which went to make up that aggregate sum, and it is not difficult to appreciate that the balance of the adjustment would in all probability be disturbed if certain of the payments which go to make up the totality dealt with by the order are withdrawn from its operation. The answer to the question is purely one of construction of the Act. If sect. 85 stood alone it seems fairly plain that the 1891 order would cease to have effect. The material words of that section are :

Where, immediately before the appointed day [Apr. 1, 1930], there is in force a financial adjustment between any spending authorities [county and county borough councils are such authorities] with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect.

Pausing here and applying the words I have read to the present case, there was a financial adjustment, namely, the 1891 order between the

spending authorities, parties to this action, with respect to the discontinued grants payable to them. It is true that the financial adjustment also covered other monies, but these were treated in the financial adjustment as one aggregate with the discontinued grants. There is nothing to suggest that the financial adjustment is to cease to have effect partially or that it is to remain in force with regard to monies other than those included under the description "discontinued grants." Had it been intended to preserve the operation of the financial adjustment, one would have expected to find inserted after the words "cease to have effect" some such phrase as "so far as it relates to the discontinued grants but not further or otherwise." The section contemplates the necessity for a new financial adjustment and provides a new method for arriving at it. The argument in favour of the continued existence of the 1891 order to a limited extent, namely, on the proceeds of Local Taxation Licences, is based on the fact that in Sched. 12, Part IV, the Local Government Act, 1888, s. 32, is not entirely repealed, but is only repealed so far as it relates to the discontinued grants. It may be that sect. 32 still remains in force if there is any purpose for which it is required, but I do not think that the fact that the repeal of sect. 32 is expressed to be partial is sufficient to justify any departure from the clear words of sect. 85. I gather that if the 1891 order remains in force the councils which are co-plaintiffs in this action receive a benefit at the expense of those which are co-defendants and that it is this fact which has rendered the action necessary.

In my judgment the question whether the 1891 order remains in force with regard to the proceeds of Local Taxation Licences must be answered in the negative. I propose, therefore, to make a declaration to that effect and to declare that a new financial adjustment is necessary in respect of the proceeds of the Local Taxation Licences and that such new adjustment ought to be made in the manner provided by sect. 85 of the Act of 1929.

Solicitors: *F. Venn & Co.*, agents for *Walter Moon*, Town Clerk, Liverpool (for the plaintiffs); *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, County Solicitor, Preston (for the defendants).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

ASH v. DICKIE.

[COURT OF APPEAL (Lord Wright, M.R., Slessor and Romer, L.JJ.),
April 28, 1936.]

Copyright—Infringement—Damages—Conversion—Measure of damages.

The plaintiff had obtained judgment against the defendants in an action for damages for conversion by publishing in the defendants' newspaper certain literary articles, the copyright in which was vested in the plaintiff. An inquiry was directed to determine the damage suffered by the plaintiff by reason of such conversion. The master, basing his assessment upon the value as pulp of the paper used for the articles, found that the damages should be £10. Upon a summons to vary the master's certificate, the judge held that the assessment should be an aggregate of the literary value of the articles, the value of the paper on which the articles were printed and the value of the process involved in printing the articles. The plaintiff appealed :—

HELD : (i) the assessment should have been based on the sum of money obtained by selling the articles at the time of the conversion.

(ii) where, as in the case of an article in a newspaper, it is impossible to apportion to the article any particular fraction of the amount received on the sale of the whole newspaper, the court must make the best estimate it can upon the evidence.

(iii) the court ought in the present case to proceed under R.S.C. Ord. 84 r. 4, and make such an order as it appeared to the court ought to have been made by the judge below.

(iv) in the circumstances the plaintiff should be awarded £100 damages for the conversion.

[EDITORIAL NOTE.] In this case the Court of Appeal have considered at length a question that was discussed by DU PARCQ, J., in the recent case of *John Lane, The Bodley Head, Ltd. v. Associated Newspapers, Ltd.*, [1936] 1 All E.R. 379. The point involved is the correct calculation of damages where, in an action for infringement of copyright, damages are awarded for conversion. The calculation is to be based upon the selling value of the infringing matter to the infringer in the form in which it was actually sold. The practical result in the case of a newspaper is to take the infringing matter as being a particular fraction of the value of each copy and thus calculate the value from the total number of copies sold.

FOR THE ASSESSMENT OF DAMAGES IN ACTION OF CONVERSION, see HALSBURY, 1st Edn., Vol. 27, Trover, pp. 908, 909, para. 1602, and FOR THE CASES, see DIGEST, Vol. 43, pp. 519-521, Nos. 574-600.]

Cases referred to :

- (1) *Sutherland Publishing Co., Ltd. v. Caxton Publishing Co., Ltd.*, [1936] 1 All E.R. 177.
- (2) *John Lane, The Bodley Head, Ltd. v. Associated Newspapers, Ltd.*, [1936] 1 All E.R. 379.
- (3) *Ewbank v. Nutting* (1849), 7 C.B. 797 ; 43 Digest 520, 532.
- (4) *Muddock v. Blackwood*, [1898] 1 Ch. 58 ; 43 Digest 520, 534.
- (5) *Reid v. Fairbanks* (1853), 13 C.B. 692 ; 43 Digest 509, 484.
- (6) *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 ; 34 Digest 656, 556.

APPEAL from order of BENNETT, J., dated Mar. 20, 1936, on a summons to vary the master's certificate. By the judgment in an action in which relief was claimed for infringement of copyright by the first defendant

and for conversion of the infringing articles by the second defendants by reason of their having inserted the articles in certain newspapers published by them, an inquiry was directed as to what damages had been suffered by the plaintiff (1) upon the infringement, and (2) upon the conversion. The master found the amount to be £52 10s. in the case of infringement and £10 in respect of the conversion, which was the value of the paper purely for purposes of pulping. Upon the summons to vary this certificate of the master the judge held that assessment of damages should be an aggregate of three determined factors: (1) the value of the literary article, on the basis of 1 guinea for each article which constituted an infringement; (2) the ascertained value of the actual paper on which the articles were printed, and (3) the ascertained value of the process involved in printing the articles.

The plaintiff appealed.

K. E. Shelley for the plaintiff: The proper measure of damages is based on a calculation as to the number of copies sold, the value of that total in pounds, shillings and pence, multiplied by 16.

Fergus D. Morton, K.C., and *H. S. G. Buckmaster* for the defendants, the *Daily Sketch* and *Sunday Graphic, Ltd.*: the plaintiff must be considered as an isolated individual having in his hands, against his will, the converted articles, and the measure of damages would be negligible because he would be quite unable to turn them to any profitable account and thus had nothing to lose.

LORD WRIGHT, M.R.: This is an appeal from an order of BENNETT, J., which was made upon an application to vary the certificate of the master as to the amount of damages in an action brought by the plaintiff for a remedy for infringement of copyright against James Dickie the author and the *Daily Sketch* and *Sunday Graphic, Ltd.*, who are the publishers of a well-known illustrated daily newspaper known as the *Daily Sketch*. Mr. Ash had written a book about dogs. Mr. Dickie was a regular contributor to the paper on the subject of dogs and it was found that he had infringed the copyright of the plaintiff's work in a number of issues in which his articles had been included, Ash being the author who owned the copyright. He is now bankrupt and his trustee in bankruptcy has sold the copyright of this work to Mrs. Courtauld. An action for infringement was brought and various remedies claimed. As against Dickie the remedy claimed was for infringement on the grounds that by copying the matter complained of he had infringed the plaintiff's copyright, and as against the newspapers, under the Copyright Act of 1911, s. 7, which was considered by this court in the *Sutherland Publishing Co., Ltd. v. Carton Publishing Co., Ltd.* (1). Sect. 7 reads:

All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production

of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

On that claim against the newspaper an order was made for an inquiry as to the amount of damages and the matter was referred to the master. He found that there was infringement in sixteen out of twenty-six articles and he was asked to assess the damages in conversion, and for that purpose it was not disputed that a large number of copies containing these infringements had been disposed of. The question was what was the proper method of assessing the amount of damages. The master said that in respect of conversion this was based on the actual value of the chattel which the plaintiff was entitled to get back. The value in this case was the mere pulp of the actual paper and he did it by weight. Each article covered about one column, on the other side of which appeared some other matter. The master adopted this method: he weighed the *Daily Sketch* and found that the weight of each copy was about $2\frac{1}{2}$ ounces. Each article was approximately one-fiftieth, and on that basis he found that the assessment should be £10 at the rate of 12s. 6d. per article.

When the matter came before the learned judge he adopted another method. He first took what may be called the "pulping" basis, but held that there were other elements to be taken into consideration and he sent the matter back to the master with a further direction that the damages were to be assessed on an aggregate by adding first the literary value of the article, secondly the ascertained value of the paper and thirdly the ascertained value of the printing. He thus added to the pulping basis, and this appeal is against that order with a cross appeal by the second defendants that the master's order should be restored and they say that the only value to be taken is the value of the paper by weight. The plaintiff says that the measure of damage should be on another footing and the court ought to see what is the value of each copy sold by the defendants and ascertain the figures on sale of each copy. That involves a rather difficult calculation because each article included only a small proportion of each whole issue, and there is therefore a very difficult question, that is, how much of each issue can be attributed in value to the article, whether it be one-fiftieth or one-hundredth of the total value of the whole issue of each of these weekly publications. Mr. Shelley was content to say that the appropriate proportion was one-hundredth and if the value to be taken as the basis of calculation is to be 1d. as the sale price of each copy the total amount is easily worked out.

Mr. Morton has attacked this suggestion very strongly, and he said that the damages have been rightly determined on what is the actual damage to the plaintiff, because if you take the plaintiff quite apart

from any question of the process of printing and publishing, and imagine him with these fourteen million strips of paper on his hands with no facilities for marketing them and no communications or organisation for distributing them on a profitable basis, you find that the plaintiff has suffered no damage at all except what he has suffered by ascertaining the value of the paper. He is prepared to accept the master's amount of £10 and no more. But I do not think that is the true measure. Nor do I think that the learned judge was correct, he having taken, as I think, what was the true amount at the time of the conversion. He has also considered certain other elements of expense which had gone towards the production of these strips of paper and to the process of printing them, and he has ordered the damages to be assessed on that basis. But in conversion the question is not what it cost to produce the article, and I do not accept the view that items of expense should be considered, but only what the article is actually worth. In my judgment in a case like this the value must be ascertained by some such calculation and estimate as that adopted by DU PARCQ, J., in *John Lane, The Bodley Head, Ltd. v. Associated Newspapers, Ltd.* (2).

DU PARCQ, J. said :

I think I ought not to regard the expenses of producing the newspaper as a relevant fact. It is not, however, my view that I can arrive by any exact arithmetical process at the sum which it is proper to award. Let it be granted that the plaintiffs are entitled to the full price for the sheets containing the story, "The Gods Decide" ; it still does not follow that the fraction of each 1d. paid for the paper which is proportionate to the space occupied by "The Gods Decide" must be taken to have been paid for that story. . . . Taking everything into consideration, and making the best estimate of which I feel myself capable on the evidence, I assess the damages for conversion at £50.

As I understand it, what the learned judge is saying is that the proper starting point for ascertaining the value of a chattel which has been converted, is to find out what it realised by sale. If, to take an example, the infringing article had filled the whole of one issue of the paper there could be little doubt that the price of the issue would be the correct amount of damages. But the difficulty here is to apportion to the article any particular fraction of the amount of the whole issue, and the question is what is the appropriate amount of the sale price, and I do not think it can be arrived at by any calculation. I think it is fairly obvious that the proper value of the particular article as compared with the totality must vary enormously. It may be of comparatively small importance or it may be of first-rate importance and in fact it may even constitute nearly if not quite the whole value of the total issue. We have in this case no materials for assessing the value of the article in each issue compared with the total value of the issue, and therefore, as I have said, we must arrive at an estimate according to the evidence, no doubt

using as a starting point the total amount realised by the sale. I have taken as the starting point of the damages the value of the chattel at the time of the conversion which is the conventional rule nearly universally adopted in assessing damages. In *Ewbank v. Nutting* (3) a cargo of salt was wrongly sold by the master of a ship which had sustained damage, rendering her incapable of continuing the voyage, and it was held that the master and owner of the ship were jointly liable for conversion and that the damages should be estimated at the cost-price of the salt and the sum which the plaintiff had paid on account of freight. I have also been referred to the judgment of KEKEWICH, J. in *Muddock v. Blackwood* (4), where the claim in conversion was under the Act of 1843, the section corresponding to the present sect. 7 and KEKEWICH, J. said, at p. 64 :

In my opinion he is entitled to the delivery-up on oath of all books in the defendant's possession, as in an action of detinue ; and to damages, as in an action of trover, for the books the defendant has sold.

He bases his estimate on the actual figure realised and there were no circumstances to suggest any other method. In *Reid v. Fairbanks* (5), referred to by Mr. Morton, the headnote is as follows :

A. contracted with B., a shipbuilder in Nova Scotia, for the building of a vessel. B. was already largely indebted to A. upon a general consignment account, and A. from time to time made considerable advances on account of the ship whilst in progress, and also supplied anchors, cables and other stores for her. On June 20, 1848, B., by a bill of sale, reciting that A. had made advances to B., and had agreed to make such further advances as he might require to build, launch, rig, and fully equip the vessel for sea, "for the security and repayment of all such sums of money as A. had already advanced or might thereafter advance, to aid and assist him to complete and finish the said vessel," bargained, sold, assigned and transferred to A. "a certain ship or vessel now in course and progress of building" by him, at etc., particularly describing it, together with certain timber in B.'s possession—"to have and to hold the said ship or vessel, etc., goods and chattels, etc., to A., his executors, etc., to their absolute use and benefit and behoof for ever, *when the said ship or vessel shall be complete and finished*, in as full, ample, and perfect a manner as if the said ship or vessel were ready for sea, and ready to be delivered to the said A. at the time of executing these presents."

On Jan. 30, 1849, B. signed a builder's certificate and declaration of ownership, stating A. to be the sole owner of the vessel, and thereupon obtained a certificate of registry in A.'s name, pursuant to the 8 & 9 Vict. c. 89, s. 11. This certificate B. retained in his own possession.

On Mar. 29, 1849, B. induced the Comptroller of the Customs at Pictou, in Nova Scotia, to cancel the above certificate, and to grant him a fresh one in his own name as owner, and on the same day executed an assignment of the ship, then in an unfinished state, to C., who took possession of her, finished her, and sent her to Liverpool with a cargo on his own account :—

Held, that the property in the ship passed to A. by the bill of sale of June 20, 1848, and that his right was in no degree limited by the *habendum* ; and, consequently, that C. was liable in trover.

And it was held that the proper principle on which to estimate damages in trover would be the value of the ship and all her stores when C. took possession of her, and the best method was to estimate what was the value of the ship at the date of assignment if she had been completed by the contractor and to deduct the money that would necessarily have been laid out by the contractor after that date in order to complete her according to contract. These cases all show that the basis is the value of the chattel at the time of conversion. And I ought to mention *Livingstone v. Rawyards Coal Co.* (6), a case where the damages were from coal being taken from underground. It was a curious case where there was a small island of coal which could not be approached except by underground approaches vested in various other owners. LORD BLACKBURN said, at p. 39 :

Now, my Lords, there was a technical rule in the English courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land ; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

Mr. Morton relied on those cases to support his contention that we are not concerned with the value of the chattel itself but only with its value as to the plaintiff, who must be treated as severable, as it were an isolated person having the chattel placed in his hands against his will. But I think that is not the true test. I think the damages in a case of conversion under sect. 7 are the value of the chattel at the time of the conversion and the estimate must be what was wrongfully obtained in disposing of it. That leaves the difficulty of deciding what was the relative value of the article, but this court is not minded to send the case back to the master. This is a case where the court ought to proceed under R.S.C. Ord. 48, r. 4, and make such an order as it appears to the court ought to have been made by the judge below. With the material before the court it can only arrive at the best estimate it can. I think the claim put forward by Mr. Shelley is in excess of what is a fair compensation, and I think the damages should be £100. The appeal is therefore allowed and the cross appeal dismissed. The plaintiffs have the costs.

SLESSER, L.J. : I agree and have little to add. The question against the publishers only for conversion is what was the value of the property which was wrongfully converted, at the time of the conversion. The views expressed by the master and the learned judge varied, in that

to ascertain the value of the damages they looked primarily at the physical paper on which the infringing articles were written, which by sect. 7 became the property of the owner of the copyright. That seems to me an illegal way of looking at the matter. At the time of the conversion the physical paper was part of a complexity of articles and the physical collection of paper which constituted the *Daily Sketch* the value of the sale of which was 1d. per copy. I think the matter which ought to be considered is the value of the plaintiff's share at the time of the conversion. It is more than the mere physical paper, and if the price at which the paper is sold is 1d., that seems to me the right standard on which to start, and starting there it becomes a matter of estimate, what was the value at the time of the conversion of the plaintiff's share in the newspaper. I agree with my Lord that the sum of £100 is a fair estimate, but the question of principle here is important. Leaving aside the consideration of the learned judge as to how much the defendants paid Mr. Dickie, which I cannot accept, two views emerge. The first is that of the learned judge and the master, and the second is that taken by DU PARCQ, J. As I read his judgment, he adopted what I suggest here is the right method. Acting on what was the value of the paper as a whole the plaintiff would be entitled to the full value of the strips. Then the question was what proportion of the whole was attributable to the plaintiff? I approve of his method and disapprove of that adopted by the learned judge and master. That is substantially what we are deciding, and the figures arrived at are the same in principle as those reached by DU PARCQ, J. I therefore agree that this appeal must be allowed.

ROMER, L.J. : I agree. But as we are differing from BENNETT, J., and the master I should like to express my reasons for so doing. The first thing to be ascertained is what is the chattel which by sect. 7 has to be deemed to be the plaintiff's property? Mr. Shelley rightly concedes that the chattel does not include the whole paper in which the article appears. The chattel is merely that part of the paper on which the infringing article is printed. In other words the chattel is part, although a physically separable part, of a composite chattel. The other part is the property of the defendants. The chattel which is the property of the plaintiff was wrongly converted by the defendants and the plaintiff is accordingly entitled to damages for conversion. I agree with Mr. Morton that the plaintiff is entitled to recover by damages the value of the chattel to *him* at the time of the conversion, or, to put it another way, that the plaintiff is entitled to be placed financially in the same position as if there had been no conversion. But then Mr. Morton goes on to argue that the value to the plaintiff of his chattel at the time of the conversion was no more than the actual value of the paper as pulp and that if the chattel had been handed to the plaintiff and retained

by him he would have been unable to dispose of it and therefore there could be no damages for conversion. But, with respect, that argument seems to me to be based on a fallacy, as it disregards the only available means which the plaintiff had of turning his chattel to profitable account. The only way was to combine with the other owners and sell as a whole. If the composite chattel were divided and his share handed to him, neither could dispose of his own part, since it is plain that you cannot sell a paper with one column cut out. The composite chattel sold as a whole was 1*d.* value but, regarding the plaintiff as being in possession of his part, Mr. Morton's argument treats him as retaining it unsold, whereas in point of fact he would combine and sell the chattel, as it has been sold, and receive his share of the proceeds. I agree that there are other merits to be considered and only a small part is to be allotted to his chattel, not necessarily even one-hundredth of the composite price. It does not follow that the value of his article is more to the total price than the space it occupies is to the total space of the issue. We have been told that it is an illustrated newspaper and one knows that some parts are naturally of greater value to the public than others. The court can do what has been done by DU PARCQ, J., and on the material available form the best possible estimate of the value to the plaintiff of his share. I agree with the Master of the Rolls that in the circumstances a fair value would be £100. Accordingly the appeal succeeds, the cross appeal fails and an order must be made as indicated by the Master of the Rolls.

Solicitors : *Paisner & Co.* (for the plaintiff) ; *Theodore Goddard & Co.* (for the defendants the Daily Sketch and Sunday Graphic, Ltd.).

[*Reported by* CHARLES E. EDEN, ESQ., *Barrister-at-Law.*]

MORLEY v. MOORE.

[COURT OF APPEAL (Sir Boyd Merriman, P., Scott, L.J., and Eve, J.),
April 27, 28, 1936.]

Insurance—Motor car—Collision—“Knock-for-knock” agreement—Right of assured to recover from other car owner.

A motorist, A., negligently damaged the car of another motorist, B., in a collision. A. and B. were insured with companies who had a “knock-for-knock” agreement. B.’s insurers paid for the repairs, and told B. that they did not wish him to claim the cost from A. Nevertheless B., suing A. in the county court, included the amount in his claim. A. maintained that B. was debarred from claiming this amount :—

HELD : neither the “knock-for-knock” agreement nor any instruction B.’s insurers might have given B. could affect B.’s common law right to sue A. for the whole of the damages caused by A.’s negligence, even though B. had been indemnified by his insurers.

[EDITORIAL NOTE. It has been usual for insurance companies dealing with motor car insurance to make what are called “knock-for-knock” agreements. In the present case, the agreement itself was not disclosed and the only evidence was that as a result of the agreement the insurance company had asked their assured not to sue the owner of the other car concerned in the collision. In these circumstances it was suggested that the right of the assured to recover in such an action was taken away ; but the court were quite clear that the existence of the agreement between the insurance companies did not in any way affect the assured’s right to recover.

FOR THE LAW OF SUBROGATION, see HALSBURY, Hailsham Edn., Vol. 18, p. 471, paras. 706, 707 ; and FOR CASES, see DIGEST, Vol. 29, pp. 52-54, Nos. 156-166.]

Cases referred to :

- (1) *Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330 ; 12 Digest 458, 3712.
- (2) *Castellain v. Preston* (1883), 11 Q.B.D. 380 ; 29 Digest 52, 156.
- (3) *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co., of London, Ltd.*, [1912] A.C. 673 ; 17 Digest 126, 343.
- (4) *Simpson v. Thomson* (1877), 3 App. Cas. 279 ; 29 Digest 290, 2355.
- (5) *Yates v. Whyte* (1838), 4 Bing. N.C. 272 ; 29 Digest 291, 2373.

APPEAL by the defendant from a judgment of His Honour JUDGE KONSTAM, K.C., delivered in the Bromley County Court on Dec. 17, 1935.

Two cars driven respectively by Morley and Moore came into collision. Morley sued in the county court for damages and Moore admitted liability. Morley included in his claim an amount of £28 2s. 8d. for repair of his car, which his insurance company had already paid. The repairs actually cost £33 2s. 8d., but under his policy he was bound to bear the first £5 of any loss. Moore (defendant and appellant) contested Morley’s claim for £28 2s. 8d. on the ground that Morley’s insurance company had paid this sum under a “knock-for-knock” agreement which they had with Moore’s insurers, and that they had told Morley that they did not wish him to sue for it. The facts were not in dispute.

The learned county court judge, giving judgment for the plaintiff,

said that he could not accept this contention, and referred to cases in which the plaintiff had been awarded the whole of the damages caused to him by the defendant's negligence although the plaintiff's insurers had already indemnified him wholly or partly (*British Westinghouse Co., Ltd. v. Underground Electric Railways Co.* (3) and *Simpson v. Thomson* (4), in which the House of Lords approved the decision in *Yates v. Whyte* (5)). Recovery upon a contract with insurers was no bar to a claim for damages against the wrongdoer.

The defendant appealed.

Frank Soskice, for the appellant: The two insurance companies had a "knock-for-knock" agreement, under which each company bound itself to refrain from exercising its right to compel an assured whom it had indemnified to sue the wrongdoer, if the latter was insured by the other company. The plaintiff Morley had been told by his insurers that he was not to sue the defendant for this sum; this, on the authority of *Hirachand Punamchand v. Temple* (1) debarred him from suing. The right to receive this sum if recovered from the defendant belonged in equity to the insurers, and they had informed the plaintiff, their assured, that they did not wish to exercise it.

R. A. L. Hillard, for the respondent, was not called upon.

SIR BOYD MERRIMAN, P.: This appeal from a judgment of His Honour JUDGE KONSTAM, K.C., raises an interesting point which, as far as I know, is a matter of first impression—at any rate so far as the Court of Appeal is concerned. The plaintiff in a running-down action before the county court judge had, in respect of himself and the passengers in his vehicle, a varied assortment of causes of action, but, eliminating all that are immaterial, he had in respect of the damage to his own motor car a claim, which is admitted to be good, for the sum of £33 odd. He was insured on the terms that he himself, as the phrase goes, was his own insurer for the first £5 of the risk. He brought his action against the defendant, and no question arises but that the defendant was liable for, amongst other things, this damage. The defendant was also insured, and we are informed, as the county court judge was informed, that there was between these two insurance companies what I am informed is known as a "knock-for-knock" agreement. We have not been, nor was the county court judge, told the terms of this agreement, but we are informed that the purpose of this agreement is that each insurance company pays its own assured, without question, that which the assured is entitled to receive under the particular policy and that both of them do their utmost to discourage either of their own assureds from making claims against the other; or, putting it in another way, the insurance companies amongst themselves do not insist upon their assured bringing such action as he may be entitled to bring against the party insured by the other insurance company.

Those facts having been stated by way of preface, the point then emerges that in fact this plaintiff claimed the whole £33, amongst other things, against the defendant, and he did so in spite of a definite direction on the part of his insurance company that, for their part, they did not wish him to do so. Can he or can he not include as a substantive head of claim and recover the £28 in respect of which he has been indemnified by his insurance company, as well as the £5 for which he himself has to bear the responsibility? It is said that as a matter of law, once he has been paid by his insurance company under his insurance policy, and that insurance company has disclaimed any desire that he shall attempt to recover the money from the other, the amount ceases to be recoverable as a matter of law. It is to be observed that the supposed disability to sue for the £28 from him is one which can be insisted upon at the instance of the wrongdoer under the terms of the insurance policy. The learned county court judge has held that the sum of £28 was recoverable, and the question is whether he was wrong in so holding.

Mr. Soskice, who, if he will allow me to say so, has argued this case most admirably, does not dispute the proposition that a long line of authorities establishes that the mere fact that the plaintiff's own insurance company have paid the particular loss is not a thing which the defendant, the wrongdoer, can take upon himself in diminution of damages, but he contends for this principle: that, where a person has a right to recover damages as a trustee for someone else, and the *cestui que trust*, by his conduct or otherwise, makes it clear that he does not want that right to be exercised and disclaims any desire to receive the proceeds if recovered, no cause of action lies. Mr. Soskice says that is so *a fortiori* if the *cestui que trust* directs that the right shall not be exercised. He says that that principle, which he submits is established as a universal principle by an authority to which I shall refer in one moment, applies in a case in which the plaintiff's insurance company, having paid the particular loss, have said, whether by agreement with the defendant's insurance company or not, to their own assured, the plaintiff: "We direct you not to sue for that particular loss." I may say, however, and I think this is an important qualification, that Mr. Soskice has not attempted to suggest that there was any fresh contract between the insurance company and the plaintiff which disabled him from suing. He says that the right to give this direction arises and the consequences of the giving of it flow automatically from the relationship of insurer and insured under the original policy of insurance.

The authority upon which Mr. Soskice relies is the case of *Hirachand Punamchand v. Temple* (1). As I will show in a moment, there are passages in two of the judgments in that case which tend to support, in the circumstances of that case, the particular proposition for which Mr. Soskice is contending. But in order to see how and why the

application of the principle is laid down, one must examine quite shortly the facts of that case. The facts were, eliminating irrelevant considerations, that on a bond in one instance and a promissory note in the other the defendant had borrowed from the plaintiffs, who were Indian moneylenders, various sums of money. Correspondence afterwards passed between these moneylenders and the father of the defendant, and as a result the father remitted sums which were considerably less than the total amount claimed under either head, on the terms that as between himself and the moneylenders those sums should be accepted in full settlement of his son's debt. It is manifest that on those facts it only needs one other circumstance, express or implied, to make a complete accord and satisfaction which would require no further discussion, and that is that in some way or another the debtor son should have been made a party to the transaction. Doubt appears to have existed, at any rate in the mind of the majority of the court, as to whether in the true sense of the word there could be said to be accord and satisfaction in that case, but it is unnecessary to investigate that question further, because it is only on the assumption that there was no accord and satisfaction that the point arises. What was said when the plaintiffs, notwithstanding their acceptance of this money from Sir Richard Temple, attempted to sue the son for the balance was that, if it was not accord and satisfaction, it might well be that the plaintiffs had ceased to be holders of the promissory note, but that in any case, however that might be, they could be restrained from suing. VAUGHAN WILLIAMS, L.J., on p. 337, puts it thus :

In my judgment, if I am right in saying that any moneys received on the note by the plaintiffs would be held by them in trust for Sir Richard Temple, then, without any question of resort to a court of equity, there might have been a defence in a court of law on the ground that any money recoverable on the note by the plaintiffs was recoverable by them merely as trustees for Sir Richard Temple, and that, under the circumstances disclosed by the correspondence, the relations between the father and son were such that it was impossible to suppose that the father wished to insist on payment of the note by the son.

FARWELL, L.J., having indicated fairly plainly that he really thought the substance of the matter was accord and satisfaction, said at p. 342, agreeing with FLETCHER MOULTON, L.J. :

The plaintiffs cannot be heard to say that they have acted dishonestly when an honest construction can be put upon their conduct by treating their acceptance and retention of the money as being upon the terms on which it was offered. If there be any difficulty in formulating a defence at common law in such case, I have no hesitation in saying that a court of equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and would have restrained them from suing under such circumstances as existed in the present case.

The question, therefore, is whether the principle thus applied to the circumstances of that case apply to this case. We are here dealing

with quite a different subject-matter: we are here dealing with an insurance company who, under their policy of insurance, are obliged to pay to the plaintiff this amount of £28. It is not suggested that there has been any contractual variation of that contract. The matter rests, as I have already said, on the rights created by the policy of insurance and payment thereunder. The plaintiff had the contractual right to recover under that insurance policy. The plaintiff also had the right to recover damages at common law, including this sum of £28, against the wrongdoer. How is it then suggested that the enforcement of the one contract bars him from enforcing his common law right to sue? In *Hirachand Punamchand v. Temple* (1) the disability imposed upon the moneylenders was due to a contract made between them and the third party. They had already entered into a contract with the son by which he owed them the money, and they chose to enter into a contract with the father which it was held disentitled them to sue. For my part I find it very difficult to see how a case like that can be applied to a case of insurers and assureds in the absence of any subsequent bargain disentitling the plaintiff to use his ordinary common law rights to sue a wrongdoer.

It is common ground, if Mr. Soskice has given us the foundation of the matter, that the insurance company are entitled to be subrogated to the rights of the assured in respect of the particular loss they have paid. I take those rights in the fullest sense indicated by BRETT, L.J., in the case of *Castellain v. Preston* (2), and add to them any other circumstances which it can fairly be suggested that BRETT, L.J., although he was clearly intending to be comprehensive, inadvertently omitted, but there is no hint in that document of any right on the part of the insurer, instead of taking advantage of the rights which the assured has, to forbid the assured to exercise those rights—not a hint of it. Yet what is said to have occurred in this case as a result of the direction by the insurance company—which for my part I cannot see that they had the slightest right to give—namely, that the assured was not to sue the wrongdoer, is that if, nevertheless, he does sue the wrongdoer and recovers the £28, he recovers it on what is called a resulting trust in favour of the wrongdoer and has to hand it back to him. That is a conception which seems to me to be very like nonsense. It is true that, if called upon to do so, the assured is obliged to sue or to allow the insurance company to sue in respect of a particular loss that they have paid; and if the assured recovers that sum he is obliged to hand it over to them because it is impressed with a trust on their behalf. But, putting that trust at its highest, I am unable to understand how it can be said that the *cestui que trust*, that is the insurance company, by taking a particular course which is not warranted by any independent contract and by disclaiming their own right as a *cestui que trust*, can impose upon

the assured another *cestui que trust* from whom at common law he is entitled to recover as damages what is said to be the subject of the trust. I do not think there is any such thing as a *cestui que trust* imposing, against the will of the trustee, some other *cestui que trust* as a substitute for himself, and I am quite sure there is no such thing as a *cestui que trust* not merely being able to substitute somebody else against the will of the trustee, but being able to substitute such a person on the terms of a different trust. The thing seems to me to be fantastic. Nor is there any need for this elaborate conception. If the insurance company insist upon their rights, their rights are perfectly plain. They can have this £28 which has been recovered, and the plaintiff has never attempted to say that they may not have it. They alone are the people who have said that they do not intend to take it; they alone have said that they do not want to have it and that the plaintiff is not entitled to recover it for them; but, as far as I can see at this very moment, they have never bound themselves by any obligation not to take that money, if and when the plaintiff offers it to them.

Assuming that the plaintiff still has his two rights: first, to recover the £28 from the insurance company on his policy, and secondly, to recover that same £28 as damages from the wrongdoer, the simple solution of this matter is for the insurance company to do that which they are entitled to do—namely, to ask him to hand them the £28. That is a perfectly simple solution and rests with the insurance company. I cannot see, however, that the fact that they choose to forgo their right to receive this sum from their assured imposes any obligation upon him. The insurance company may choose to make the assured a present of the £28, but that does not affect his legal right. I think the sum and substance of the matter is this: that this case is not in a class which resembles in any particular the case of *Hirachand Punamchand v. Temple* (1). There is lacking, amongst other things, what I say is the essence of the case of *Hirachand Punamchand v. Temple* (1): namely, that as between themselves and the third party, by a bargain which was superimposed upon and subsequent to the original contract between the moneylenders and the son, the moneylenders obliged themselves to accept the money in settlement, and the court held that, although there was no accord and satisfaction, the moneylenders had thereby also disabled themselves from suing the original debtor. Here there is nothing resembling that position, and for that reason I decline to apply a phrase, of however general an import, used with reference to an entirely different set of facts and circumstances to which hitherto nobody has ever suggested that they were applicable.

I only want to add one other thing. I hope that the result of this judgment will be that the plaintiffs will realise that they still have whatever may be their full rights accompanied by whatever duties result

from the exercise of those rights, notwithstanding arrangements made behind the scenes between the insurance companies. If, contrary to the opinion that I have been expressing, the combined effect of the arrangement whereby the assured is regarded as his own insurer for a certain proportion of the loss, and of this agreement colloquially known as a "knock-for-knock" agreement, were used seriously to prejudice insured persons when insisting upon the whole of their legal rights, I should wish to consider whether the agreement were contrary to public policy. It is unnecessary to say more for the moment, but if I were to consider that question I should want to know a great deal more precisely than I know at present, what are the terms of that agreement, and I should wish to hear some further argument upon the subject.

SCOTT, L.J. : I entirely agree with the judgment of my Lord, and as he has analysed the position at length and with great care, I do not want to repeat anything that he has said. But I do wish to observe this : that one of the grounds of appeal put forward by the defendant upon which the argument before us arises, is a ground that I have never seen before. It says this :

The learned judge should in law have held that the said sum of £28 2s. 8d. was irrecoverable in law ; in that a payment of this sum had been made by the plaintiff's insurers to the repairers of the said plaintiff's motor vehicle pursuant to a "knock-for-knock" agreement made between them and the defendant's insurers, and that they had intimated to the said plaintiff before action brought that they waived or abandoned any claim for the return of such sum from the defendant's insurers and directed him not to include the claim for such sum in the action, and that the plaintiff in fact abandoned his claim for the said sum of £28 2s. 8d. on the hearing of the said action.

I will deal with the last point first. The fact that the plaintiff pressed his claim and got judgment for it shows he did not abandon it. With regard to the rest of the plea, I cannot see any reason in law or in equity why it should constitute a defence for the defendant in the action that the plaintiff brought against him for damages for a tort.

In addition, I should like to say this : that to put forward a plea resting in part, according to the allegation, upon an agreement which is not produced in court and of which the terms are not proved is, in my view, wrong. If that was an essential part of the plea, in my view the learned judge ought to have refused to have anything to do with the "knock-for-knock" agreement until it had been properly produced and proved before him in order that he might consider it. Presumably it was in writing, and it would be a matter for the interpretation of the court. Be that as it may, I entirely agree with the terms of the judgment of the county court judge. I think he was right in saying that, even although the plaintiff's insurers may have told the plaintiff that they did not want to have handed over to them any part of what he might recover

from the defendant to the extent of the £28 in which they were interested ; although they may have told him not to sue for it ; and although there was a " knock-for-knock " agreement between them and the defendant's insurers, nevertheless in my view none of those facts gives rise to any defence known to the law or the principles of equity, so far as I know them. My view is that there is no right whatever in an insurer to dictate to his assured whether he shall or shall not abstain from enforcing against a third party remedies which go in diminution of the loss against which the policy is issued. They have an absolute right to require him to enforce his remedies, but in my opinion they have no right to prevent him enforcing them.

For these reasons I agree entirely with what my Lord has said.

EVE, J. : I agree. I had difficulty in appreciating, first of all, what was the object of the action, and secondly, what purpose was to be gained by it if it went to appeal. I agree with what my Lord has said, and I agree with the reasons that he has given for dismissing this appeal with costs.

Appeal dismissed with costs.

Solicitors : *Frederick W. Pope* (for the appellant) ; *Bishop & Fenton-Jones* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

ELKINGTON AND COMPANY, LIMITED, v. AMERY.

[COURT OF APPEAL (Greer, Slessor and Greene, L.JJ.), **April 21, 1936.**]

Infant—Contract—Necessaries.

The appellant in Aug., 1931, purchased from the respondent company certain jewellery and paid cash. In Jan., 1932, he purchased a lady's vanity bag for £20 10s. on credit. In June and Aug., 1932, he purchased also on credit two rings for £42 and £38 respectively. On the purchase of the first ring he brought a young lady with him and stated that he wanted an engagement ring. The second ring was treated as the wedding ring. All these transactions took place while the appellant was under age. After he had attained his majority, proceedings were commenced against him, but were compromised upon his agreeing to pay the debt by instalments. After payment of one instalment, he made default and the present proceedings were brought against him for the balance outstanding. The appellant was the son of a former cabinet minister :—

HELD : (i) the rings, being purchased as gifts to the person to whom the appellant was engaged to be married, were necessaries.

(ii) the vanity bag could not be regarded as such a gift and was not a necessary.

[**EDITORIAL NOTE.** This case would seem to draw a sharper distinction than has previously been done as to presents to an intended wife. The previous cases speak of presents to a lady who afterwards became the infant's wife, but the decision

here seems to require some evidence of a definite engagement to bring them within the class of necessities. It would seem, too, that the engagement being established, substantial presents may be regarded as necessities.

AS TO NECESSARIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 610-613, paras. 1312, 1313, and FOR CASES, see DIGEST, Vol. 28, pp. 165-171, Nos. 215 315.]

Cases referred to :

- (1) *Nash v. Inman*, [1908] 2 K.B. 1 ; 28 Digest 167, 240.
- (2) *Jenner v. Walker* (1868), 19 L.T. 398 ; 28 Digest 166, 231.
- (3) *Hewlings v. Graham* (1901), 70 L.J.Ch. 568 ; 28 Digest 171, 309.
- (4) *Peters v. Fleming* (1840), 6 M. & W. 42 ; 28 Digest 167, 236.

APPEAL from a judgment of His Honour JUDGE TOBIN, K.C., given at Westminster County Court on Nov. 1, 1935. The appellant, the defendant in the county court, was the son of a former cabinet minister, and on Aug. 31, 1935, being then under age, purchased from the plaintiff company a wrist-watch, at the price of £42 10s., paying cash. Later in the same year he purchased a diamond pin and dress chain for £38 and again paid cash. On Jan. 15, 1932, he purchased a lady's gold vanity bag for £20 10s., for which he was given credit. On June 2, 1932, he came to the plaintiff company's premises accompanied by a lady and purchased a lady's diamond ring for £42, which was said to be an engagement ring. On Aug. 23, he purchased a diamond and platinum ring for £38 and on each of these occasions was given credit. After he had attained his majority the plaintiffs sued him for the price of the goods supplied but the action was compromised upon his agreeing to pay the amount due in instalments. The plaintiff defaulted in the payment of such instalments and the present proceedings were then commenced for the balance then outstanding, £83 16s. 6d. The appellant pleaded his infancy and denied that the articles were necessities. The county court judge held the articles to be necessities and this appeal was brought upon that decision.

H. G. Garland and *R. Dreschfield* for the appellant.

A. E. Beecroft for the respondent.

Garland : The onus is on the plaintiff to show that the articles are suitable to his station in life and that he is not already sufficiently supplied with them (*Nash v. Inman* (1)). Rings are necessities (*Jenner v. Walker* (2)), but the ring here was not necessary even as a wedding ring, because it was too expensive. [He also referred to *Hewlings v. Graham* (3).]

Beecroft : On the question of necessities, *Peters v. Fleming* (4) and *Jenner v. Walker* (2) show that articles of this nature are necessities. The gift of the vanity bag must be regarded as part of the series of transactions consequent upon the engagement.

GREER, L.J. : The questions raised in this case deal with a matter on which the law has developed from time to time. The action was

brought by Elkington & Co. against Mr. Amery, the son of a former cabinet minister, to recover £83 16s. 6d., being the balance due on an account for goods sold and delivered to the defendant, who was then under age, the items of which were a gold vanity case £20 10s., purchased on Jan. 15, 1932, and later a diamond ring £42, and a diamond and platinum hoop ring £38.

As to whether the goods were necessities *Nash v. Inman* (1) lays down that the original contract is void, but the infant is liable to pay a reasonable charge for the goods. The prices here are not excessive. There was no evidence before the learned judge to justify him in concluding that the vanity case was a necessary. As regards the other items it is otherwise. On the purchase of the first ring the appellant brought with him a young lady and said he wanted an engagement ring. In law the judge is entitled to consider probabilities and they are that the lady who accompanied the defendant was the lady for whom the ring was intended. He later purchased an "eternity ring," and this was treated before the judge as a wedding ring.

In these circumstances I think it is sufficiently established that there is evidence on which the judge could find these were debts incurred for necessities in the case of a young man in the circumstances of the defendant, and applying the principle laid down in *Jenner v. Walker* (2), the two rings were necessities. The appeal is therefore allowed to the extent of £20 10s. only. Substantially the respondent has succeeded and must have his costs.

SLESSER, L.J. : I am of the same opinion. Distinctions occur in the authorities between purchases of goods as gifts to friends and to a person to whom the minor is engaged to be married. The evidence in this case entitled the learned county court judge to regard the two rings as necessities and that a reasonable price should be paid for them. The vanity case is in a different position. There is no evidence that it was purchased in respect of any engagement.

GREENE, L.J. : I agree.

Appeal allowed as to £20 10s. ; appellant to pay respondent's costs.

Solicitors : *F. O. Chinner & Co.* (for the appellant) ; *McKenna & Co.* (for the respondents).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

R. v. GEE. R. v. BIBBY. R. v. DUNSCOMBE.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., du Parc and Goddard, JJ.), **May 1, 1936.**]

Criminal Law—Preliminary hearing before justices—Depositions—Form prescribed by statute imperative—Indictable Offences Act, 1848 (c. 42), s. 17—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 2 (1), (2).

At the preliminary hearing before justices in respect of an indictable offence it is essential that the depositions be taken in strict accordance with the Indictable Offences Act, 1848, s. 17. Such depositions therefore must be taken down in writing at the hearing in the presence of the accused and then in such presence read over to the witnesses and signed by them. The whole of the depositions must be signed by the justices. If this procedure is not followed there can be no legal committal for trial.

[EDITORIAL NOTE.] There have been many suggestions for shortening the preliminary hearing before justices in respect of indictable offences. In particular, the time taken by the writing down of depositions has been attacked. In the present appeal, it appeared that the justices or their clerk had attempted to shorten these proceedings by using a statement of the witnesses' evidence and merely checking it at the hearing. This was held to be quite irregular and the statutory regulation of these matters must be strictly followed.

AS TO DEPOSITIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 107, 108, para. 139; and FOR CASES, see DIGEST, Vol. 14, pp. 192-196, Nos. 1720-1748; and FOR THE INDICTABLE OFFENCES ACT, 1848, s. 17, and ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT, 1933, s. 2, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 4, p. 492 and Vol. 26, p. 81.]

Case referred to :

(1) *Crane v. Public Prosecutions Director*, [1921] 2 A.C. 299; 14 Digest 245, 2365

APPEAL from a conviction by the Recorder at Oldham Quarter Sessions on Mar. 13, 1936, on a charge of breaking and entering certain shop premises with intent to commit a felony.

The three defendants were charged before the Oldham magistrates in October, 1935. The chief constable had before the hearing taken statements from the witnesses. These statements were not taken down in the presence of the defendants. At the hearing before the magistrates, these statements were handed to the magistrates' clerk. The procedure which was followed in the police court was described in this way to the learned recorder by counsel for the Crown :

When the matter goes before the court the officer in charge of the prisoners puts questions to the witnesses. Their replies are given and the questions and answers are given in the presence of the accused. The clerk of the court follows the note which he has in front of him to see whether or not the evidence which is given agrees with the note he already has. The prisoners are then given an opportunity of putting any question they desire. The evidence having been taken in that way on oath and checked off in writing, the writing being in existence before the sitting

I agree, it is then read over to the witnesses in the presence of the accused and the witnesses sign it.

The magistrates committed the defendants for trial. At the trial before the learned recorder these so-called depositions were not used.

R. N. Bibby-Trevor for the appellants : There being no proper depositions, the appellants were not legally committed for trial, and therefore there was in law no trial upon which a conviction could be founded.

D. Hamwee for the Crown.

GODDARD, J. : In this case the three prisoners appeal from a conviction before the learned recorder of Oldham, when they were charged with breaking and entering a shop with intent to commit a felony therein. They do not appeal on the facts. The more serious ground of appeal put forward is with regard to the question whether or not they were ever lawfully before the court of quarter sessions at all, because they say there had been no committal for trial under the Administration of Justice (Miscellaneous Provisions) Act, 1933, and therefore there was no indictment before the court. That depends upon whether the justices lawfully committed these men for trial.

The facts relating to the hearing before the justices are the important matter. For many years past the practice which has prevailed at Oldham seems to have been that when an indictable offence was investigated, the chief constable interviewed the witnesses—quite properly, of course—and took a statement which was typed out in narrative form. When the prisoners were brought before the justices, exactly what form of examination took place in front of the prisoners is not clear, but what is clear is that the provisions of the Indictable Offences Act, 1848, s. 17, were not complied with. This Act was passed, amongst other things, to introduce uniformity into the practice of magistrates when dealing with indictable offences as a preliminary to committal for trial. Before 1848 the practice was very varied and no uniform principles were applied in taking depositions. For many years it was impossible for prisoners to obtain the depositions. One of the objects of the Act was to standardise procedure before justices where indictable offences which might have to go for trial were concerned, and it is of the utmost importance that magistrates should understand that the provisions of that Act should be strictly complied with.

The provisions of sect. 17 are :

In all cases where any person shall appear or be brought before any justice or justices. . . . such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him take a statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively

by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation.

The section shows the form that is to be followed. There are certain other provisions as to witnesses who die or who are absent from the trial.

It is common ground that the proceedings before the justices were not in accordance with the statute. Under the Administration of Justice (Miscellaneous Provisions) Act, 1933—the Act which abolished grand juries—provision was made for the presentment of indictments, and sect. 2 (1) provides :

Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly.

Then there is a provision that the judge or chairman may, if satisfied that the said requirements have been complied with, ask the proper officer to sign.

Subsect. (2) provides :

Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence. . . .

“Committed for trial” must mean lawfully committed, and legally committed for trial. It is defined by the Interpretation Act, 1889, s. 27.

Now it seems to this court clear that the proceedings before the magistrates were so defective that there was no lawful committal for trial here at all. Consequently the provisions of the Act of 1933 were not complied with; and no bill of indictment could be preferred against these men, and accordingly the document before the learned recorder was not an indictment and these men could not be tried. The point was brought before him on Jan. 7. He expressed some doubts whether he was not bound to try the bill before him signed by the clerk. He gave the men an opportunity to move for a writ of *certiorari* with a view to having the proceedings quashed. They did not take that course. At the next sessions the same objection was taken on their behalf: that there was no indictment before the court. The learned recorder thought that he could not give effect to that objection, but that he was bound to try them.

In the opinion of this court he was wrong. Although they might have applied for *certiorari* that does not make the proceedings regular if they did not do so. We are of the opinion that the objection taken

by the prisoners is good. The result is that there has been what is sometimes called a mistrial; in this case it would perhaps be more correct to say that there had been no trial at all. Under the decision in *Crane v. Director of Public Prosecutions* (1), this court has power to order that a proper trial should take place; as it was put in that case, "that the proceedings should re-commence from the point where they broke down." Therefore this court has power to order that these men should be taken back and that the proceedings should be re-commenced *de novo*, that the depositions be properly taken and the men brought before the court of quarter sessions.

But this court has also power, where it thinks the interests of justice require it, to order that a verdict of acquittal should be entered and to allow the prisoners to be discharged. In the circumstances of this case the court thinks that is a proper order to make here, because these men were in custody three months before trial. They were then held to bail with this charge hanging over them for another three months. They were then tried and convicted on Mar. 13. They have been in custody another two months, and if this court were to order a new trial and the proceedings had to begin again, they would have to wait for trial before quarter sessions, which would probably be in July. It would be oppressive to commit them for retrial. In the circumstances, therefore, the court has come to the conclusion that the conviction should be quashed and that the men should be discharged. We also express the hope that, if this procedure obtains elsewhere, the magistrates will comply strictly with the requirements of the Act. The order of the court is therefore that the conviction be quashed and the prisoners be discharged.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellants); *Director of Public Prosecutions* (for the Crown).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law*.]

Re RAY'S WILL TRUSTS, PUBLIC TRUSTEE v. BARRY.**[CHANCERY DIVISION (Clauson, J.), April 28, 29, 1936.]**

Will—Construction—Gift to abbess of convent at the time of the death of testatrix—“Absolutely”—Attestation by members of the community—Wills Act, 1837 (c. 26), s. 15.

A nun in a certain convent by her will gave all her property to the person who at the time of her death should be or should act as the abbess of the said convent absolutely. The abbess by the constitution of the community governed the affairs of the community and in particular controlled the expenditure of all its property. A new abbess was elected every three years, and in the absence of the abbess, a vicarress would act in her place. The testatrix at the time of her death was possessed of no property except that she had under her father's will a testamentary power of appointment over a certain sum of money. The will was witnessed by two nuns, one of whom became the abbess of the convent at the time of the death of the testatrix. A summons was taken out to determine whether the power of appointment had been effectually exercised, and, if so, the destination of the bequest, having regard to the attestation of the will by parties apparently interested therein :—

HELD : (i) the will was an effective exercise of the power of appointment.

(ii) the gift was to the abbess of the convent as trustee to hold the money as part of the funds, under her control, of the convent.

(iii) the word “absolutely” meant that the abbess was to obtain full ownership of the money free from all fetters for any purpose for which the funds of the convent might properly be used.

(iv) inasmuch as she was receiving the money as trustee, the fact that an attesting witness was the legatee in trust did not invalidate the gift.

(v) the benefit derived by the attesting witnesses as members of the community for whose benefit the money was to be administered did not amount to a legacy or gift within the Wills Act, 1837, s. 15.

[EDITORIAL NOTE.] In this case the learned judge has considered at some length the general position in law of gifts to the heads of religious houses. Difficulties arise in such cases because a gift to such a community is not generally a charitable gift and requires to be safeguarded from defeat by the rule of perpetuities. There is also a point of complication in the fact that the constitution of such houses usually provides for the periodic election of a new head. In the present case the will was attested by two members of the community. One of these at the time of the death of the testatrix was the abbess, in whose favour the will was made. The other as one of the community would benefit as such under the will. There was a question, therefore, whether the gift was avoided by the Wills Act, 1837, s. 15, by reason of an attesting witness taking a beneficial interest thereunder.

AS TO GIFTS TO RELIGIOUS COMMUNITIES, see HALSBURY, Hailsham Edn., Vol. 4, p. 115, para. 151, and p. 135, para. 176; and FOR CASES, see DIGEST, Vol. 8, pp. 317-320, Nos. 982-1020. AS TO WILLS ACT, 1837, s. 15, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 556, 557, paras. 1102-1105; and FOR THE CASES, see DIGEST, Vol. 44, pp. 274-278, Nos. 1070-1108. FOR THE SECTION, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 20, p. 443.]

Cases referred to :

- (1) *Re Barclay, Gardner v. Barclay, Steuart v. Barclay*, [1929] 2 Ch. 173, Digest Supp.
- (2) *Thornber v. Wilson* (1858), 4 Drew 350; 8 Digest 317, 987.
- (3) *Re Delany, Conoley v. Quick*, [1902] 2 Ch. 642; 8 Digest 245, 50.
- (4) *Re Garrard, Gordon v. Craigie*, [1907] 1 Ch. 382; 8 Digest 294, 716.
- (5) *Cocks v. Manners* (1871), L.R. 12 Eq. 574; 8 Digest 245, 49.
- (6) *Young v. Davies* (1863), 2 Drew. & Sm. 167; 44 Digest 274, 1073.
- (7) *Thorpe v. Bestwick* (1881), 6 Q.B.D. 311; 44 Digest 277, 1101.
- (8) *Irvine v. Sullivan* (1869), L.R. 8 Eq. 673; 44 Digest 620, 4496.
- (9) *Re Foord, Foord v. Conder*, [1922] 2 Ch. 519; 44 Digest 966, 8196.

ADJOURNED SUMMONS by the Public Trustee as trustee of the will of Brisco Ray, deceased, to determine the questions set out below. By the said will £3,000 was bequeathed to trustees to be held for the testator's daughter Agnes Ray during her life and after her death, as to capital as well as to future income, in trust for such person or persons and for such purposes as his said daughter should by will or codicil appoint. Agnes Ray who, at the time of the execution of her will and at the time of her death, was a nun in the Franciscan Convent at Woodchester, on Nov. 14, 1932, made a will whereby she gave all her property to the person who, at the time of her death should be, or should act as the abbess of the said convent absolutely and appointed her executrix of her will. The will was witnessed by the defendant Helena Mary Barry and Mary Brasier-Creagh, both of whom were nuns in the convent. In Sept. 1934, Helena Mary Barry became abbess of the convent, and was such at the time of the death of the testatrix Agnes Ray on July 20, 1935. The questions which arose to be determined on the death of Agnes Ray were whether she had effectually exercised the power of appointment given to her by the will of her father Brisco Ray and whether, on the true construction of the will, and having regard to the Wills Act, 1837, s. 15, which provides that no person who acts as the attesting witness of a will shall take any beneficial interest thereunder, the defendant Helena Mary Barry was beneficially entitled or (alternatively) entitled as trustee to the capital moneys representing the settled legacy, or whether they formed part of the estate of the testatrix and were undisposed of by her will or whether they devolved as in default of appointment under the will of the testator Brisco Ray.

T. A. C. Burgess, for the plaintiff, stated the facts.

Hon. Charles Russell, for the defendant Helena Mary Barry: It is immaterial whether this defendant takes as a trustee for the community or beneficially, for even if she takes beneficially sect. 15 of the Wills Act, in the circumstances of this case, does not apply.

(i) The words in the will "or shall act as" abbess, make it plain that the testatrix was not giving this property to a person by a particular

description, but that she was seeking to direct the property to certain ends through the medium of an office holder. *Re Barclay, Gardner v. Barclay* (1) is a stronger case than the present, but *Thorner v. Wilson* (2) shows that it is not necessary to find some plain indication of a trust such as there was in *Re Barclay* (1). In *Re Delany, Conoley v. Quick* (3), the words used were "or their successors" which are not as strong as the words used in this case. See also *Re Garrard, Gordon v. Craigie* (4), *Cocks v. Manners* (5).

With regard to the word "absolutely," that is a word which would cover "absolutely in point of interest" or "absolutely as a word of limitation." It is a word of uncertain import and where from the rest of the will there is a clear indication establishing a trust, the appropriate meaning will be given to the word of uncertain import, and the word "absolutely" here should be held to be confined to "absolutely from the point of view of limitation."

CLAUSON, J.: You say that this is an immediate gift (so that there is no question of a perpetuity) to a mere trustee for the benefit of the community. But the difficulty is that the attesting witnesses are members of the community.

Russell: In the event of their shares being bad the rest of the community will benefit. It is not a common tenancy but a joint tenancy: *Young v. Davies* (6)

(ii) If it is held that there is not sufficient in this will to establish a trust and that Helena Mary Barry takes beneficially, sect. 15 of the Wills Act has no application to a case such as the present, where at the time of the execution and attestation of the will, which is the vital time (see *Thorpe v. Bestwick* (7)), it could not in any case be said that the attesting witness was a legatee. The section does not apply to a case such as this where if the witness had died immediately after attesting there could have been no question of the witness taking at all.

Wilfrid Hunt, for the second defendant, one of the next of kin: (i) This gift fails, having regard to sect. 15 of the Wills Act. The mere fact that a gift is given to a person not by name but as occupier of an office is not in itself sufficient to say that the gift is not beneficial, and the word "absolutely" is a strong indication that the person to whom the gift is made is intended to take beneficially. *Thorpe v. Bestwick* (7) does not apply because there the witnesses at the date of the will not only had no interest, but had no potentiality of interest. Here there was a potentiality at the time of execution and attestation that one or both of the attesting witnesses would become abbess. But even if there is a trust the gift fails altogether because it is impossible to give effect to it and cut the attesting witnesses out.

(ii) As the will has effectually appointed Helena Mary Barry as executrix and the testatrix has shown an intention to make the fund

over which she had a power of appointment her own it goes to her next of kin and not in default of appointment.

Henry Johnston, for the third defendant, one of the persons entitled under the will of *Brisco Ray* to the fund in default of appointment, on the question as to whether there was a trust adopted *Hunt's* argument with the additional support of *Irvine v. Sullivan* (8), and as to the meaning of the word "absolutely" of *Re Foord, Foord v. Conder* (9).

CLAUSON, J. : The point that I have to decide arises under the will of Miss Agnes Ray, who made her will on Nov. 14, 1932. At that time, as I understand the evidence, she was possessed of no property except that she had a testamentary power of appointment over a sum of £3,000 under the will of Mr. *Brisco Ray*, deceased. Her will, the terms of which I will read in a moment, undoubtedly purported, if full effect can be given to its terms, to exercise that power of appointment, and to pass the £3,000 over which she had a testamentary power.

Before reading the will I will state certain evidence, which is admissible, as to the circumstances of the testatrix, and which will throw some light upon the meaning of certain terms which she used in her will. It appears from the affidavit of the Public Trustee, who is the trustee of the will which created the power of appointment that, at the date of her will, Miss Ray was a nun in the Franciscan Convent at Woodchester in the County of Gloucester. The will was attested by two ladies, Miss Helena Mary Barry and Miss Mary Brasier-Creagh, who at that date were two of the nuns resident in the convent. The attesting witness Miss Barry was elected abbess of that convent in Sept. 1934, that is during the testatrix's lifetime, the testatrix having died on July 20, 1935. It appears from the affidavit of Miss Barry that the religious community at Woodchester, of which the testatrix was, and of which Miss Barry is, a member, is a community of nuns about 27 in number residing there and following the rule of the Third Order of St. Francis. By the constitution of the community the abbess, with the assistance of an advisory council, but subject to the bishop, governs the affairs of the community in all respects, and in particular controls and dictates the expenditure for the benefit of the community of all property belonging to the community. The abbess is elected from the community by the senior members of the community and a new abbess is elected every three years, the former abbess unless re-elected then resigning. In addition to the abbess, as provided by the constitution of the community, another member of the community, similarly elected, fills the office of vicarress, and, in the absence from any cause of the abbess, presides over and governs the community, and in particular, in the event of the death of the abbess during her term of office, the vicarress takes her place and acts as abbess until the election of a new abbess can be held.

That information I am entitled to know before I undertake the task

of reading and construing the will, and I proceed now to read the will and to say in the light of these facts what is the meaning of the phrases which the testatrix has used. The will is very short and is in these terms :—

This is the last will of me Agnes Ray of the Franciscan Convent, Woodchester, Gloucestershire, whereby I give all my property to the person, who at the time of my death shall be, or shall act as the abbess of the said convent absolutely, and I appoint her executrix of this my said will.

Before considering exactly what that means let me just say this. It is, of course, open to a testator, if he thinks proper, to leave a legacy to the person who, at the time of his death, shall occupy the position of an officer in a voluntary society : in other words, provided only the intention is made plain, it is perfectly open to a testator to give to that person, of whose personality he is of course, *ex hypothesi*, ignorant, the gift of a legacy to be the property of that person and to be at his absolute disposition and under his control, which would pass, if he were to die shortly after the death of the testator, to his executor, and be available for his debts and so forth. If one comes to think of it that bequest would be a very remarkable one to make. It would be a bequest to give a personal benefit to someone whose personality is *ex hypothesi* unknown to the testator : a very odd gift, but a gift which can, of course, be made, and if the words of the will indicate that that is the gift which is being made, the court of course would give effect to it.

Another form of gift would be a gift to the controlling officer of a society in his capacity of officer, to be dealt with as he, in his official capacity of officer according to the duties of the office, would deal with the other funds which, as such officer of the voluntary society, it would be his duty to deal with : in other words a gift to an official for the purposes of his office, which he is to receive and apply for the purposes of the society. This, again, is a perfectly good gift to which the court would give effect, subject only to this point, which sometimes causes trouble, that, if the framing of the gift indicates that the legacy is not to be used at once and immediately for the purposes of the voluntary society, but is to be subject to the fetter that it is to be set aside and the income only of it is to be used, the capital being preserved as what one may call for convenience an endowment of the voluntary society, the court would not give effect to that gift, because it infringes the rule of the court that no gift, subject to the exception laid down in the case of a charitable gift, is to tend to a perpetuity, and a gift to endow a voluntary society necessarily, of course, tends to a perpetuity.

Another form of gift which is perfectly lawful is this. The testator may give to a person who, at his death occupies the position of holding a particular office in a voluntary society, a legacy for the society, expressed

in such terms that it is not to be used as the property of the society, but is to belong individually to the members of the society, so that the officer's duty will be, when he gets the fund, simply to divide it up perfectly equally among the members of the society, so that each member of the society receives a share of it as his own property, which is at his own disposal, passing to his executor at his death and being available for his debts and so forth. That is, one would imagine, a very unlikely form of gift. Supposing a legacy of £100 is given to the chairman of, shall I say, the Athenæum Club for the club. I do not think many of the judges would hold that it would be the duty of the chairman to divide that fund up into as many parts as there are members of the Athenæum Club and to send the resulting amounts to those persons for their own use. And I do not think that any court would have much difficulty in holding, having regard, I admit, to the expression "for the club," that the chairman of the Athenæum Club, whoever he might be at the time of the testator's death, was not intended to pay the money into his own pocket, but that it was for him to add it to the other funds available for the purposes of the society known as the Athenæum Club.

The real difficulty, therefore, having regard to the way testators and testatrixes make their wills, is that there is an infinite possibility of language being used in such a way that one or other of these three possible types of gift may be the type which is intended by a testator or testatrix. The duty of the court, after informing itself of such facts relating to the testator or testatrix, and to the institutions or person mentioned in the will—evidence of which facts is admissible in order to assist the court in doing what is called "sitting in the testator's or testatrix's armchair" for the purpose of construing the will—is to take what is written in the will and, to the best of its ability, to say what is the net result of the words, fairly construed, which are used in the will.

With that observation I return to this simple will. "I give all my property to the person, who at the time of my death shall be, or shall act as the abbess of the said convent absolutely." Now one thing seems perfectly clear. There is nothing in that gift which would lead the court, certainly which would lead me, to construe that gift as falling within the third type of gift I have mentioned. There is no indication, in my view, that the fund is to be divisible among the members of this voluntary society spoken of as the Woodchester Convent.

There seems to be two alternatives. Is this a gift to a beneficiary which has to be dealt with as part of the funds which the beneficiary administers, or is it a gift to whoever may be the person, and that the testatrix could not possibly know, who happens to occupy the position either of abbess or acting abbess, for her own personal use. I will come in a moment to the consideration of the word "absolutely." But eliminating for the moment the word "absolutely," and considering the

gift as being to the abbess, and realising that, according to the evidence, as the testatrix must well have known, the mere temporary absence of the abbess on business might leave someone described as vicaress, who would be acting as abbess of the convent, in other words that the personality of the legatee is one which is, so to speak, of no importance at all as compared with the office, I am driven to the conclusion that this is a gift to the official in respect of her office. And that, after all, is natural—to say that it is a gift to the official in respect of her office as an addition to the funds which it is her office to deal with as an administrator. In other words it is a gift to the abbess, *qua* abbess, for the purposes of the voluntary society, the convent.

As I think has been indicated in the argument, the real difficulty in this case is the use of the word “absolutely.” “Absolutely” means free of a fetter of some kind. It is suggested that I ought to construe that word to mean that this person, this chance person who happens to be the recipient of this fund, is to have it for her own, although it is given to her only in respect of her office, it may be her quite temporary office, of vicaress or abbess. I cannot put such a meaning as that on the word “absolutely.” I say the word “absolutely” has some meaning and I think it means this. I think it not only means that the recipient will obtain the full ownership, for the purposes indicated, of that which is given, but I think it also means that the recipient is to be free from any fetter which would bind her to keep the fund intact for the purposes of the community. It is really saying: “This is not to be fettered by the fact that it is to be an endowment and is to be a gift of income only. It is to go into the funds of the society and to be used without fetters for any purpose for which the funds of the society can be used.” That gives a reasonable meaning to the whole matter and makes the whole will consistent, and produces such a testamentary disposition that, in the circumstances of the case, is exactly what one would imagine must be the disposition intended by the testatrix. I think the gift is a free and perfectly good one to the lady who was abbess at the death of the testatrix, that is Miss Barry, for the purposes of the convent, that is, as part of the property of the voluntary society.

Another point has been raised, which is this. As I have said, the will is attested by the lady who happens to be the lady who will be the hand to receive this gift. If she receives it as a trustee only, and I think she does receive it as a trustee only, the fact that she was an attesting witness to the will, can, on well settled authority, be no objection to the validity of the gift. But the two ladies who were the attesting witnesses were at the time of the execution of the will and both are now, members of the convent, and the argument is that, in so far as they form part of the community, the gift, according to my construction of it, will enure in some sense to their benefit. But does that circumstance afford any

objection to the validity of the gift ? If it does it must be because the circumstances come within the terms of the Wills Act, 1837, s. 15. The terms of that section are these, leaving out irrelevant words :—

If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate . . . shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void.

I do not see my way to hold that the attesting witness here obtained under the will, as I construe it, any such beneficial legacy or interest as to bring her within the terms of that section. The truth is that the gift is a gift to swell the community funds, to be administered for the benefit of the community. I do not think it is a fair construction of the section to treat the fact that an attesting witness may, as a member of the community, get some benefit in some shape or form out of the administration of the fund, as amounting to a legacy or gift by the will to such individual member of the community. Accordingly, in my view, the point taken under sect. 15 of the Wills Act is a false one, and the result of it is that I shall declare, following the terms of clause 1 of the summons that, as to the settled legacy of £3,000, the capital of which the testatrix had power to appoint, in the events which have happened, and on the true construction of the will, the first defendant, that is Miss Barry, is entitled to the said money as a trustee to hold the same as part of the funds, under her control, of the convent in the will mentioned. The costs of all parties to be taxed as between solicitor and client and to be paid out of the property appointed.

Solicitors : *Hobson & Cobbett* (for the plaintiff and the second and third defendants) ; *Witham & Co.* (for the first defendant).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

SHREWSBURY AND TALBOT (COUNTESS) v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), April 21, 22, 23, 1936.]

Income Tax—Annuity—“Clear of all deductions”—Sur-tax—Assessment on gross amount.

The appellant was entitled under private Acts of Parliament and a jointure deed made in pursuance of the said Acts to certain rent-charges “clear of all deductions whatsoever for taxes or otherwise.” The appellant having been assessed to super-tax and sur-tax in respect of these rent-charges without addition of the sum due for income tax, additional assessments were made. Upon appeal the special commissioners held that the words “clear of deductions for taxes” must be construed as granting rent-charges “free of income tax,” and that for super-tax and sur-tax purposes income tax had to be added to the rent-charges in calculating the appellant's liability:—

HELD: the special commissioners were right. This was not a case where the gross sum had never existed as in *Neumann v. Inland Revenue Commissioners* (2); but the trustees must be taken to have paid the annuities out of a gross sum, paying the income tax to the revenue authorities and the net annuity to the annuitant.

[EDITORIAL NOTE.] The interest in this case is of a negative kind and lies in a proposition which the learned judge refused to accept. Relying upon the case of *Neumann v. Inland Revenue Commissioners* (2) the appellant suggested there was a class of annuities where there was no gross amount of the annuity, but only a net amount and that the amount actually paid to the annuitant. This argument was rejected because the trustees must have paid the income tax to the revenue authorities and the net amount to the annuitant. In the case of *Neumann v. Inland Revenue Commissioners* (2) a reserve fund was distributed without deduction and there never was any gross amount in existence.

AS TO THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 250, 251, paras. 507, 508, and for the CASES, see DIGEST Supp.

Cases referred to:

- (1) *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315; 28 Digest 75, 407.
- (2) *Neumann v. Inland Revenue Commissioners*, [1934] A.C. 215; Digest Supp.
- (3) *North British Railway Co. v. Scott*, [1923] A.C. 37; 28 Digest 88, 514.
- (4) *Brooke v. Price*, [1917] A.C. 115; 28 Digest 75, 409.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The facts and arguments are stated in the judgment.

J. Millard Tucker, K.C., and *Cyril King*, for the appellant.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondents.

LAWRENCE, J.: In spite of the very able arguments which were addressed to me by Mr. Tucker in opening this case and by Mr. King in reply, I think that the appeal must be dismissed and that the decision of the commissioners ought to be affirmed by me.

The question is whether two jointures which were granted to the Countess of Shrewsbury under a private Act of 1843 are to be brought in for super-tax and sur-tax at the sum of £3,000 or the sum of £3,000 with income tax added thereto. That question depends upon the construction of the Act of 1843 having regard to the decisions which have been arrived at upon these matters, and particularly to the decision in the Court of Appeal on the construction of this very statute in the case of *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury* (1). The section of the Act of 1843 which has to be construed is in these terms so far as material: It gives a power of jointure to the extent of £3,000 per annum to John, Earl of Shrewsbury, and the power is to grant:

unto and to the use of any woman or women with whom they respectively may marry or may have married . . . for her or their jointure or jointures, any annual sum . . . not exceeding in the whole for any one such woman the yearly sum of three thousand pounds, clear of all deductions whatsoever for taxes or otherwise.

That is sect. 7 of the Act of 1843. There are two other sections in the Act which have been referred to, sect. 9, which imposes a limit of £5,000 upon the power to jointure, and sect. 10, which imposes a limit of £6,000; and there is a similar limit in the Act of 1862, which was an Act passed for similar purposes. By deed the Earl of Shrewsbury exercised that power in the terms of the statute, granting two annuities of £1,500 to the Countess of Shrewsbury, and using the words of sect. 7 of the Act of 1843, namely, "clear of all deductions whatsoever for taxes or otherwise." In 1924 the matter was brought before the court by the trustees of the Shrewsbury estates and Lady Shrewsbury by way of originating summons to have it determined whether the annuities granted by the deed to which I have referred were to be free of income tax and super-tax, as was contended in the court below, and free of income tax, as was contended in the Court of Appeal. The first point that was made on behalf of the Crown in this case is that I am precluded by this judgment of the Court of Appeal, which it is contended is a judgment that these jointures were granted free of income tax but not of super-tax, those being the words of the formal order of the Court of Appeal, "free of income tax other than super-tax." It is said that that was the judgment of the Court of Appeal, and it is admitted on behalf of the appellants that if that was the judgment of the Court of Appeal, and that those words, "free of income tax," are to be read in the sense which has been attributed to them by the courts, that I must decide the case as the commissioners have decided it and dismiss the appeal. But it is contended by Mr. Tucker and by Mr. King on behalf of the appellant that when the case in the Court of Appeal is looked at and the reasoning of the learned Lords Justices is considered, the formal order so read does not accord with the reasons given by the Lords Justices. If I thought that that was so I should not hold myself bound by the words of the

formal order, because in my view the court is bound by the principle of the decision of another court of superior or co-ordinate jurisdiction and not by the words of the formal judgment; but I do not take that view of the reasoning of the learned Lords Justices in the *Shrewsbury* case (1). Great reliance was placed upon the observations of SARGANT, L.J., in that case, at page 341, where he was negating an argument which had been based upon the provisions of sects. 9 and 10, an argument which said that the amount of the annuity granted by sect. 7 could not be taken to be a sum larger than £3,000, because if it were so read it might bring the figure of the jointures empowered to be granted above the limit imposed by sects. 9 and 10. That argument had been dealt with by both the Master of the Rolls and by WARRINGTON, L.J., in the sense that they had said that the limit imposed by sects. 9 and 10 ought to be read in the same sense as the limit of £3,000 which was imposed by sect. 7, and that there was, therefore, nothing in the argument. But SARGANT, L.J., said this at p. 341:

Then comes the particular argument as to sects. 9 and 10. That argument really depends on two suggestions. The first suggestion is that the limits of total charging of the jointures spoken of do not apply to jointures of the same special character as the jointures mentioned in sect. 7, and the second suggestion is that the creation of the jointure in sect. 7 is the creation of two charges, the first of £3,000 itself, and the second the amount charged necessary to defray the income tax. In my judgment neither suggestion is sound. What is authorised by sect. 7 is the creation of a specially favourable annuity—namely, one that is exempt from the liability to have income tax deducted by the tenant for life when he comes to pay the charge, and on all ordinary principles of construction the superadded sects. 9 and 10 are dealing with annuities of the same character as those created under sect. 7—namely, annuities with this special exemption.

Now it is said that in that passage SARGANT, L.J., is saying that this was a specially favourable annuity and that it was an annuity which enjoyed a statutory freedom from deduction by the trustees, and that in those circumstances it must be treated as an annuity of the amount which it states, namely, £3,000, and that the annuitant cannot be treated as receiving anything more than that £3,000 and cannot be treated as receiving the amount of the tax which has actually been paid by the trustees. But if one reads the passage in the judgment of SARGANT, L.J., which precedes that passage, it would appear that that cannot have been the intention of the words which he uses on page 341, for on page 340 he says:

There is nothing in the Act of 1842 to prevent the division of a total income between several beneficiaries in such a way that the person receiving fixed income may have the benefit of receiving it as so absolutely fixed and invariable as to have his income tax provided for out of the total income.

When one finds such a passage as that preceding the other passage in his judgment, and when one finds nothing in the judgments of the other

members of the court which suggests any such view as is expressed, or said to be expressed, by SARGANT, L.J., in the words I have read from page 341, and one finds that the operative order of the court is framed as it is in this case, namely, that the jointure and rent-charges are respectively payable free of income tax, it seems to me impossible to read the judgment in any way but that it was a judgment that the effect of the statute of 1843 was to grant these jointures free of income tax in the sense that the annuitant must be taken for the purposes of super-tax to have received the amount of the annuity and the amount of the tax thereon which had been discharged by the trustees. I therefore think I am constrained by that judgment to hold that the amount which ought to be brought in for super-tax and sur-tax purposes in this case is £3,000 and the tax thereon. But in deference to the arguments which have been addressed to me, I think perhaps that I ought to deal with them in more detail. As I understand the arguments, they were these. It was said in the first place: annuities are sometimes granted free from income tax and in other cases an annuity is granted in such words as these: "Such sum as after deduction of tax leaves a sum" of a certain amount; and it was agreed by counsel for the appellant that in those cases the annuitant must be taken to receive for tax purposes the amount of the annuity and the amount of the tax. Then it was said there is a third class: where an annuity is granted, and the payer of the annuity does not in fact exercise his right of deduction. He has the right of deduction and he cannot by agreement dispose of that right, but he may not exercise it. My attention was called to the case of *Neumann v. Inland Revenue Commissioners* (2), which it is said was a case which illustrates this third category of annuities. In that case a company, the Salisbury House, Limited, had been taxed upon its property in land under Sched. A, but the land in question had been let at a considerably higher sum than the amount assessed under Sched. A, and litigation was going on between the revenue and the company as to the taxability of the company upon this extra sum, the difference between the actual amount of the rents and the amount assessed under Sched. A. The company accordingly placed the sum to reserve pending litigation, and when the litigation was decided in favour of the company the company declared a dividend out of this sum and absorbing this sum which had been placed to reserve. The question in *Neumann v. Inland Revenue Commissioners* (2) was whether these dividends were liable to sur-tax in the hands of their recipients. It was held in the House of Lords that those sums were paid out of profits which had been charged and that they were liable to sur-tax, but that they were only liable to sur-tax on the actual amount received by the recipient of the dividend and not, as was contended on the other side, upon the amount received by the recipient plus what was said to be the appropriate amount of

tax upon that sum. It is said here that that case is applicable to the present, because there the company when it paid its dividend did not in fact deduct any tax, and it was said that the House of Lords decided that in such circumstances the sur-tax liability of the recipient was only for the amount actually received; and so here it is argued the liability for super-tax and sur-tax on the Countess of Shrewsbury is only for the amount which she actually receives, because the trustees have not deducted income tax, and as a matter of fact could not.

In my judgment that case is not really applicable to the present case. The facts of it were extremely special. It was decided upon different rules and different Acts and with reference to dividends. One of the principal grounds for the decision appears to be the ground that in the particular circumstances of that case the gross sum from which the income tax was deducted had never in fact existed. Owing to the particular facts of that case, income tax under Sched. A having been deducted, this reserve fund had been accumulated and was distributed *in toto*, and, as LORD TOMLIN said at p. 230 :

it would be repellent to most minds that the appellant should be charged as a part of his income with a sum which not only has never come to him but has never existed in fact. It is plain that the respondents' cross-appeal, which seeks to treat the sum of £4,275 as a net sum, corresponding to a gross sum of £5,343 15s. assumes that the amount divisible by the company was something in excess of anything they ever had to divide.

£4,275 is the sum that the shareholder had received as dividend. The facts of this case are quite different, because it is not shown and must be assumed upon the facts which are stated in the special case that the trustees have paid income tax pound for pound upon the amount paid upon this annuity. I therefore hold that *Neumann's* case (2) does not establish the third category of annuities which Mr. Tucker and Mr. King contend for. But I think the case of *North British Railway Company v. Scott* (3) is an authority which is more closely appropriate to this case, although there again it was a case which was decided upon a different schedule. It was a case in which the railway company had agreed with its employees not to deduct from them income tax which by a special provision of the Income Tax Acts has to be paid by railway companies, and it was held in that case both by the courts in Scotland and by the House of Lords that the effect of that contract by the railway company not to deduct the tax was that the income of the employee was the salary plus the amount of the tax. So here, in my judgment, that being in that case a perfectly competent agreement for the railway company to make with its employees, there is by the Act of 1843 imposed upon the Earl of Shrewsbury and his trustees the obligation not to deduct the tax. Similarly in this case I am of opinion that the recipient of the annuity must be taken to have received the annuity plus the amount

of the tax, in the same way that the employees of the railway company were held to have received for the purposes of income tax the salary plus the tax.

Mr. King, in his reply, submitted to me that the true analogy with the present case was a case where the payer of an annuity agreed to pay a sum, say £500, *simpliciter*, and although he had the power to deduct income tax from that sum did not do so, and he argued that in such circumstances in any event if he had meant to deduct the amount of the tax it would have reduced the amount which the annuitant received to £400 or some such sum, and that where he did not in fact exercise his power it could not increase the annuity beyond the sum of £500, which was the full extent of the sum agreed to be granted. But in my judgment that is not a true analogy with the present case.

I have to consider, apart from the judgment of the Court of Appeal, which I hold is binding upon me, the words of the Act of 1843, and I am unable to draw any distinction between the words, "clear of all deductions whatsoever for taxes or otherwise," and the words, "free of all deductions for income tax or otherwise." It is true, of course, that if the words had been "free of tax," they would then have been read as including super-tax, and the super-tax would have had to be paid by the trustees. The only reason why they are not so read here is because the word "deduction" is included, and super-tax is not imposed by way of deduction. That is an accident which is due, no doubt, or partly due, to the fact that this Act of 1843 was passed long before super-tax was ever thought of, and just after the Act of 1842 had been passed which did impose income tax by way of deduction upon annuities. But the phrase, "clear of all deductions" seems to me to have the same meaning as "free of all deductions" and I am unable to see that the introduction of the word "deduction" ought to have the effect contended for by the appellant. I think that the case of *Brooke v. Price* (4), which uses the words "clear without deducting" indicates that the reference to deduction does not have the effect contended for by the appellant.

The object of this Act of 1843 was, I think, simply to grant power to the Earl of Shrewsbury and his trustees to grant annuities within a certain limit, and it had no other reference to income tax or super-tax at all. I am, therefore, of opinion that the words, "clear of all deductions whatsoever for taxes or otherwise," do not prevent the proper sum which has to be brought in for the purpose of super-tax and sur-tax being the amount of the annuity plus the amount of the income tax thereon. The appeal will therefore be dismissed with costs.

Solicitors: *Nicholson, Freeland & Shepherd* (for the appellant);
Solicitor of Inland Revenue (for the respondents).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

EVANS v. HASSAN AND ANOTHER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), April 28, 1936.]

Street traffic—Express carriages—Road service licence—Special occasion—Road Traffic Act, 1930 (c. 43), s. 72—Road Traffic Act, 1934 (c. 50), s. 25.

A motor-coach owner, H., by arrangement with a theatre manager, M., caused a party to be taken from Hounslow to Epsom Races and back. H. had no road service licence to run motor coaches from Hounslow to Epsom, and the coach drivers carried no work tickets. Informations were laid against H. for using and against M. for causing to be used motor vehicles as express carriages otherwise than under road service licences, contrary to the Road Traffic Act, 1930, s. 72. The justices found that H. had been induced by M. to believe that the party was a private one, and, therefore, there being no *mens rea*, that he had committed no offence under sect. 72. The justices consequently found that M. had not caused an offence to be committed, and dismissed both informations. The informant appealed:—

HELD: (i) as the drivers had not carried work tickets, the conditions of the Road Traffic Act, 1934, s. 25, had not been complied with and the respondents could not be heard to say that the party was a private one within that section. Therefore in the absence of a road service licence, both H. and M. had committed offences against sect. 72 of the Act of 1930.

(ii) (GODDARD, J., expressing no opinion) *mens rea* is not a necessary ingredient of an offence against the Road Traffic Act, 1930, s. 72.

[EDITORIAL NOTE.] In order that a motor passenger vehicle may be held to be on a special occasion for a private party it is essential that the provisions of the Road Traffic Act, 1934, s. 25, be complied with and unless that is the case the journey cannot be such a special occasion. This is not a case where it is essential to prove *mens rea* and it is not, therefore, sufficient that the hirer tells the owner or driver of the vehicle that the occasion is a "private party" in order to relieve the latter of liability.

AS TO SPECIAL OCCASIONS, see HALSBURY, Supp. to Vol. 27, para. 611; and FOR CASES, see DIGEST Supp., Street Traffic, Nos. 76h.-76m. FOR THE ROAD TRAFFIC ACT, 1934, s. 25, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 554.]

APPEAL by way of a case stated from a decision of the justices of the petty sessional division of Brentford dismissing two informations against one Hassan for using two motor vehicles as express carriages otherwise than under road service licences, contrary to the Road Traffic Act, 1930, s. 72; and two informations against one Matthews for causing the said two vehicles to be so used contrary to the same section.

The respondent, Matthews, the manager of the Dominion Theatre, Hounslow, arranged with the respondent, Hassan, a proprietor of motor omnibuses and motor coaches for the conveyance of two parties consisting of sixty persons to Epsom on Derby Day, 1935. The motor coaches picked up the sixty passengers, who had booked seats, and duly proceeded to Epsom, returning that evening to the Dominion Theatre. Hassan

who had been led to believe that it was a private party had no road service licence to run motor coaches from Hounslow to Epsom. The appellant, an examiner for the Metropolitan Traffic Area, laid informations against the respondents, alleging offences against the Road Traffic Act, 1930, s. 72. The justices found that Hassan was unaware that the passengers did not constitute a private party and dismissed the informations against him. They also found that, as Matthews had not caused any offence to be committed he had committed no offence, and they dismissed the informations against him. The justices found as a fact that no work ticket had been carried by the drivers of the coaches. The informant appealed.

Valentine Holmes for the appellant : The Road Traffic Act, 1930, s. 72, contains an absolute prohibition and does away with the necessity of proving *mens rea*.

GODDARD, J. : The fact that it is an absolute prohibition is not enough in itself to do away with *mens rea*.

Holmes : It is the driver's duty to carry a work ticket to make the passengers a private party (Road Traffic Act, 1934, s. 25).

H. Malone for the respondent Hassan : *Mens rea* is an essential ingredient of the offence.

The respondent, Matthews, was not represented.

LORD HEWART, L.C.J. : This appeal ought to be allowed. On the question as to whether this was a private party within the meaning of the Road Traffic Act, there is no longer any doubt since the passing of the Road Traffic Act, 1934, s. 25. That section provides in the clearest possible way that certain conditions must be satisfied, and then lays down in subsect. (1) (g) :

The driver of the vehicle must carry a work ticket containing such particulars as may be prescribed for the purpose of enabling the record of the journey made under the last foregoing paragraph to be traced and identified.

Here, the justices have found as a fact that no ticket was kept or record made by the respondent, Hassan. That being so, the respondents cannot be heard to say that this was a private party under sect. 25, and the justices had no alternative but to convict. The case ought to go back to the justices with a direction that they should find that the offences which were charged have been proved.

DU PARCQ, J. : I agree. I should like to add a few words as to the case of the respondent who is not represented here, because the justices seem to have fallen into an error which may be made by other justices unless they know all the circumstances. The charge against Mr. Matthews was of causing the vehicles to be used otherwise than under road service licences. There is no doubt on the facts, as I understand them, that he had caused the vehicles to be so used. If it be assumed that

Mr. Hassan was not guilty because he did not know that he was committing an offence, then the position would be that Mr. Matthews, by deceiving Mr. Hassan, had persuaded him to do something which was contrary to the Act. The justices appear to have thought that, because Mr. Hassan, in those circumstances, would not have had a guilty mind and did not know he was committing an offence, therefore Mr. Matthews, who had induced him to do what was contrary to the law, would not have committed an offence. This conclusion of the justices is quite wrong. It is plainly immaterial whether the person who actually drove the vehicle knew that he was committing an offence or not. As to the case of Mr. Hassan, I entirely agree with what my Lord has said.

GODDARD, J.: I agree that, as the driver was not carrying his work ticket Hassan's case is not arguable. I reserve my opinion as to whether *mens rea* is or is not a necessary ingredient of this offence, and I express no opinion upon the point.

Appeal allowed, with costs.

Solicitors: *Treasury Solicitor* (for the appellant); *G. Martin & Co.* (for the respondent, Hassan).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

NELSON v. BLACKFORD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq, and Goddard, JJ.), **April 24, 1936.**]

Street traffic—Express carriage—Road service licence—Special occasion—Road Traffic Act, 1930 (c. 43), s. 61 (1).

A motor car adapted to carry less than 8 persons was used to convey 4 persons from Leeds to Blackpool in order that those persons might view the illuminations there. These illuminations were continued for 49 days:—

HELD: this was not a "special occasion" within the Road Traffic Act, 1930, s. 61 (1). Such occasions must be *ejusdem generis* with those given in the proviso to the subsection and must be a particular and individual occasion.

[**EDITORIAL NOTE.** The previous cases have dealt with regularly recurring occasions. Here the occasion was one particular to the Jubilee year but as it continued for some weeks it was not within the subsection. The occasion, it is said, must be *ejusdem generis* with a race meeting and presumably its duration is limited to a few days.

AS TO SPECIAL OCCASIONS, see HALSBURY Supp. to Vol 27, para. 611, and FOR CASES, see DIGEST Supp., Street Traffic, Nos. 76 h.-76 m. FOR THE ROAD TRAFFIC ACT 1930, s. 71, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 654].

Cases referred to:

(1) *Miller v. Pill*; *Pill v. Furse*; *Pill v. Mutton (J.) & Son*, [1933] 2 K.B. 308; Digest Supp.

(2) *M'Dougall v. Paterson*, [1933] S.C. (J.) 39; Digest Supp.

APPEAL by way of case stated from a decision of justices sitting at Leek, Staffordshire, dismissing two informations against the respondent for offences against the Road Traffic Act, 1930, s. 61.

The respondent was summoned for permitting a motor vehicle to be used without a road service licence. On Sept. 13, 1935, the respondent drove a saloon motor car adapted to carry less than eight passengers from Leeds to Blackpool and returned on the following day. There were four passengers in the car and the purpose of the journey was to view the Blackpool illuminations in celebration of the Jubilee of His late Majesty King George V. The illuminations at Blackpool were continued for 49 days.

The question was whether this was a special occasion within the Road Traffic Act, 1930, s. 61 (1).

Valentine Holmes for the appellant: A special occasion must be an occasion *ejusdem generis* with those stated in the proviso to sect. 61 (1).

Kenelm Preedy for the respondent: Each night of the illuminations at Blackpool was a special occasion and if one went, one would come under the rule applicable to race meetings. Unless a wrong principle had been applied, the finding of the justices should be upheld. [He referred to *Miller v. Pill* (1) and *M'Dougall v. Patterson* (2).]

LORD HEWART, L.C.J.: I am of opinion that this appeal ought to be allowed. The words of the Road Traffic Act, 1930, s. 61 (1) in the proviso are "by reason only that on occasions of race meetings, public gatherings and other like special occasions, it is used to carry passengers at separate fares." The justices here have held that the Blackpool illuminations are a special occasion within the meaning of the proviso and the said Blackpool illuminations, as appears from para. 5 of the case, are illuminations which last for some weeks. In my opinion, it is quite impossible in view of the words of the Act and the cases decided to hold that the occasion is a special occasion. A special occasion must be a particular and individual occasion analogous to a race meeting. An attraction at a seaside resort which lasts 49 days cannot, in my opinion, come within those words. I think therefore that this appeal ought to be allowed with a direction to the justices to find the offence charged proved.

DU PARCQ, J.: I agree.

GODDARD, J.: I agree.

Solicitors: *Treasury Solicitor* (for the appellant); *Doyle, Devonshire & Co.*, agents for *J. Morris Shaw*, Leek (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law*.]

Re A REFERENCE UNDER GOVERNMENT OF IRELAND
ACT, 1920, s. 51.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Thankerton, Lord Maugham, Sir George Lowndes, Sir Sidney Rowlatt), **March 27, 1936.**]

Privy Council—Reference—Taxation—Powers of Government of Northern Ireland—Tax substantially the same as income tax—Government of Ireland Act, 1920 (c. 67), s. 21—Finance Act (Northern Ireland), 1934, s. 3.

By the Finance Act (Northern Ireland), 1934, s. 3, every county and county borough of Northern Ireland was required to make an annual contribution towards the cost of educational services, and such contribution was to be raised by means of the poor rate. The Government of Ireland Act, 1920, s. 21 makes it incompetent for the Parliament of Northern Ireland to impose any tax which is substantially the same in character as an existing tax. The tax imposed under the Act of 1934 was said to be similar in character to income tax:—

HELD: there was no such similarity, and the legislation was within the powers of the Parliament of Northern Ireland. In considering such a question regard must be had to the nature of the tax and not to the method of assessment.

[EDITORIAL NOTE.] The question raised is purely one of the legislative competence of the Parliament of Northern Ireland in regard to taxation. The nature of a tax or imposition is not to be determined by the machinery of its assessment or collection, but by the character of the tax itself.

AS TO REFERENCE TO THE JUDICIAL COMMITTEE see HALSBURY, Hailsham Edn., Vol. 11, pp. 232, 233, para. 448.

FOR THE GOVERNMENT OF IRELAND ACT, 1920, s. 21, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 5, p. 594.]

Case referred to:

(1) *London County Council v. A.-G.*, [1901] A.C. 26; 28 Digest 73, 392.

REFERENCE under the Government of Ireland Act, 1920, s. 51, to determine whether the Finance Act (Northern Ireland), 1934, s. 3, is beyond the powers of the Parliament of Northern Ireland. The Belfast Corporation challenged and the Government of Northern Ireland supported the validity of the section. The section is set out in the judgment.

Gavin T. Simonds, K.C., Sir W. M. Graham-Harrison, K.C., J. M. Whitaker, K.C., and J. C. MacDermott, for the Belfast Corporation: Though, in form, the Finance Act, 1934, s. 3, provides for the payment of yearly contributions to the exchequer by county and county borough councils, such councils have no discretion as to the method by which they are to be raised; their duties are altogether ministerial; they are but statutory agents for the collection and transmission of the rates by means of which the contributions are directed to be raised, and the substance and true nature and effect of sect. 3 is to impose a charge in aid of state funds upon the individual ratepayers. Such charge, though expressed to be leviable by means of the poor rate, is not to be levied or paid to

meet the requirements of any local service or expenditure and is not subject to the control of any local authority; it is, by the terms of sect. 3 (1), a payment to the exchequer by way of contribution towards that part of the cost of educational services which is thrown upon state funds by virtue of the Education Act (Northern Ireland), 1923, ss. 73 (1), 73 (4), (as amended by Education Act (Northern Ireland), 1930, ss. 26, 75, 76), and the regulations made thereunder. As a rate is essentially a local charge levied by a local authority for local purposes, the charge imposed upon ratepayers by sect. 3 is not a rate, or in the nature of a rate, but is in reality a tax imposed by the central government for the service of the state. Such tax is substantially the same in character as income tax charges under Sched. B. Both taxes are charged in respect of the occupation of hereditaments. The assessment of each is primarily made on the same basis, that is to say, on the net annual value of the premises concerned. Each is charged upon the occupier and in case of non-payment the statutory provisions for recovery of distress and sale are similar. In enacting sect. 3 the Parliament of Northern Ireland has, in effect, and notwithstanding the form of sect. 3, attempted to alter the law relating to income tax under Sched. B. so as to increase taxation thereunder, and in so doing has gone beyond the legislative powers conferred upon it by the Act of 1920. The tax sought to be imposed by sect. 3, in so far as it falls upon the numerous and substantial class of ratepayers, who own as well as occupy the houses in respect of which they are rated, is substantially the same in character as income tax charged under Sched. A, and is not distinguishable in any material particular from an additional assessment thereunder. In the alternative, it is a tax which the Parliament of Northern Ireland has not power to impose having regard to the nature and intendment of the Act of 1920.

The Attorney-General for Northern Ireland (A. B. Babington, K.C.), Harold L. Murphy, K.C. and J. Desmond Chambers for the Government of Northern Ireland: The local authorities in Northern Ireland are not, like the local authorities in Great Britain, in full control of educational expenditure assisted by Government grants. The Government of Northern Ireland has full power to legislate with regard to education, and to throw the cost of educational services either upon state funds or upon the rates. The Act of 1923 passed by the Government of Northern Ireland made provision for the incidence of educational costs and this Act is admitted to have been within the powers of that Government. If sect. 3 alters this incidence, the Government had full power to amend their own Acts. In Ireland the principle of requiring a rate to be levied by local authorities in order to produce a lump sum payment towards central government expenditure on a service extending over the area of more than one of such authorities is one of very long standing. The Income Tax Acts are devoted to the ascertainment and taxation of

true individual income for the purposes of the Acts, whereas a rate is a levy upon property calculated in accordance with its annual value, but which can be recovered from the occupier of such property despite his not having been the occupier during the year of assessment. It is the fact that whereas in Great Britain there is no direct connection between valuation for rating and value for income tax, in Northern Ireland there is a special provision that the annual value for the purposes of Sched. A is to be the value in the valuation lists. This difference in the procedure for arriving at value cannot affect the distinction between rating and income tax. The express exclusion, e.g., of any power in the Parliament of Northern Ireland to impose a general tax on capital (Government of Ireland Act, 1920, s. 21 (1)) negatives any implication that there is a general limitation on the powers of that Parliament, restricting it to the imposition of taxes of a nature already adopted by the Parliament of the United Kingdom.

The judgment of their Lordships was delivered by LORD THANKERTON.

LORD THANKERTON: The Finance Act (Northern Ireland), 1934, s. 3, provides as follows:—

3.—(1) There shall be paid to the exchequer of Northern Ireland by the council of every county and county borough an annual contribution towards the cost to the said exchequer of educational services.

(2) The contributions to be paid by each such council as aforesaid in respect of each financial year shall be as follows: (a) in respect of the year ending Mar. 31, 1935, an amount equal to the sum which would be produced by a rate of sixpence in the pound on the rateable value of the county or county borough; (b) in respect of each subsequent year, an amount equal to the sum which would be produced by a rate of one shilling in the pound on the rateable value of the county or county borough.

(3) The contribution to be paid by the council of a county or county borough shall be raised by means of the poor rate, and shall, so far as it represents a rate on the rateable value of a borough or other urban district, be raised by the council of the borough or urban district upon the demand of the county council.

Where a council, for the purpose of providing any sums required to be raised by them for the contribution to be paid in respect of the year ending on Mar. 31, 1935, borrow money temporarily in exercise of the powers conferred upon the council by the Local Authorities (Financial Provisions) Act, 1921, s. 3 (or any similar enactment in a local Act), the term within which such money is required to be repaid shall be a period not exceeding six months from the ending of the said year.

(4) The contributions payable under this section shall be paid in such instalments payable at such times as the Ministry of Finance may direct.

(5) Expenditure incurred by a council in paying any contribution or meeting any demand under this section shall not be taken into account for the purposes of the deficiency contribution under the Local Government (Rating and Finance) Act (Northern Ireland), 1929, ss. 12 or 13 as amended by any enactment for the time being in force.

(6) In this section the expression "rateable value" means the rateable value, subject to the provisions of the said Local Government (Rating and Finance) Act, Part I, of the hereditaments and tenements rated to the poor rate for the financial

year immediately preceding the year in respect of which the contribution is to be paid.

The parties interested, who appeared before the Board, were the Belfast Corporation, who challenged the validity of the section above quoted, and the Government of Northern Ireland, who supported the validity of the legislation.

The corporation bases its challenge on the provisions of the Government of Ireland Act, 1920, s. 21 (1), which provides as follows :—

21.—(1) The power of the Parliaments of Southern Ireland and Northern Ireland to make laws shall include power to make laws with respect to the imposing, charging, levying, and collection of taxes within their respective jurisdictions, other than customs duties, excise duties on articles manufactured and produced, and excess profits duty, corporation profits tax, and any other tax on profits, and (except to the extent hereinafter mentioned) income tax (including super-tax), or any tax substantially the same in character as any of those duties or taxes, and the Governments of Southern Ireland and Northern Ireland shall have full control over the charging, levying, and collection of such taxes as their respective Parliaments have power to impose, and the proceeds of all such taxes shall be paid into the consolidated fund of Southern Ireland or Northern Ireland, as the case may be.

Provided that it shall not be competent for the Parliament of Southern Ireland or the Parliament of Northern Ireland to impose any tax, whether recurrent or non-recurrent, of the nature of a general tax upon capital, not being a tax substantially the same in character as an existing tax.

The corporation maintains that under sect. 3 of the Act of 1934 a tax is imposed by the Parliament of Northern Ireland which is substantially the same in character as income tax.

In the first place, the corporation contends that, while in form the contributions under sect. 3 of the Act of 1934, are paid by the council of a county or county borough to the exchequer, and it is the council that raises the amount of the contribution by means of the poor rate, the council have no choice in the matter and are merely the hand by which the central authority imposes the levy on the ratepayers, which is therefore a tax imposed by the central authority on the ratepayers. In view of the opinion formed by their Lordships on the second contention of the corporation, it is unnecessary to decide this question, but their Lordships will assume that the first contention of the corporation is correct.

It therefore remains to consider the second contention of the corporation, namely, that the tax so imposed by the central authority on the ratepayer is "substantially the same in character" as income tax.

Counsel for the corporation sought to establish this substantial similarity in character by a detailed comparison of the provisions of the Income Tax Act, 1918, under Sched. A and, in particular, Sched. B, with the provisions of the Poor Relief (Ireland) Act, 1838, along with the fact that under the Income Tax Act, 1918, s. 187 (1), the value of all tenements and rateable hereditaments for the purposes of Scheds. A

and B is ascertained primarily according to the valuation for poor rate purposes. But, in the opinion of their Lordships, it is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery—often complicated—by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax. Such an examination as counsel for the corporation invited their Lordships to enter upon would tend to narrow the legislative powers of taxation of the Parliament of Northern Ireland almost to the vanishing point, whereas by sect. 21 (1) of the Act of 1920 legislative powers are conferred in general terms, subject only to the specified exceptions.

In a familiar passage (*L.C.C. v. Attorney-General* (1), at p. 35), LORD MACNAGHTEN has described the character of income tax as follows :—

Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Sched. D and those assessed under Sched. A or any of the other schedules of charge. One man has fixed property, another lives by his wits ; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all.

The purpose of the Income Tax Acts is to tax a person's total income from all sources ; the method of assessing income derived by ownership or occupation of hereditaments is somewhat arbitrarily based on annual value and not on actual income, but that does not alter the essential characteristic of income tax that it is a tax on income generally.

On the other hand, the poor rate is leved in respect of the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the ratepayer is in fact deriving profits or gains from such occupation. A dwelling-house is a burden, not a source of profit, for the occupier who pays rent for it. He is rated on the value of the burden, while he remains unrated in respect of his whole profits, be they from business or from investments. In their Lordships' opinion this marks the essential difference in character between income tax and rates, and it is unnecessary to consider other and less important differences between them.

Their Lordships are therefore of opinion, even assuming that under the Finance Act, 1934, s. 3, a tax is imposed on the ratepayers by the central authority, that such tax is not substantially the same in character as income tax, and that the provisions of sect. 3 are within the powers of the Parliament of Northern Ireland. Their Lordships will humbly advise His Majesty accordingly.

Solicitors : *Dyson, Bell & Co.* (for the Belfast Corporation) ; *Linklaters & Paines* (for the Government of Northern Ireland).

[*Reported by S. P. KHAMBATTA, ESQ., Barrister-at-Law.*]

ATTYGALLE v. R.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Maugham, Sir Sidney Rowlatt), **March 26, 1936.**]

Privy Council—Practice—Criminal cases—Special leave to appeal—Misdirection—Burden of proof—Circumstances only within knowledge of prisoners—Ceylon Evidence Ordinance No. 14 of 1895, s. 106.

The Ceylon Evidence Ordinance No. 14 of 1895, s. 106, enacts that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The accused were charged in respect of an illegal operation performed upon a woman while she was under chloroform. The defence was that no operation took place but merely an examination. The learned judge directed the jury that, the facts being specially within the knowledge of the accused, the burden of proving the absence of any operation was upon them :—

HELD : (i) the direction was an incorrect state of the law, and the onus that there was a criminal operation was upon the prosecution.

(ii) in view of other evidence in the case, there was no such substantial injustice as is necessary to justify the granting of special leave to appeal in a criminal matter.

[EDITORIAL NOTE.] The Ceylon law here adjudicated upon is, in fact, precisely similar to the English law. The consideration of the case of *Lawrence v. R.* (2), which it was suggested had widened the class of cases in which special leave to appeal will be granted, was deferred until a case more suited to that discussion arose. For the present it seems that the old rule as laid down in *Ibrahim v. R.* (1) is still the correct one, and the one that will guide their Lordships in granting special leave to appeal in criminal cases.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 231, 232, para. 447, and FOR THE CASES, see DIGEST, Vol. 17, pp. 488-491, Nos. 525-564.]

Cases referred to :—

- (1) *Ibrahim v. R.*, [1914] A. C. 599 ; 17 Digest 491, 560.
- (2) *Lawrence v. R.*, [1933] A.C. 699 ; Digest Supp.

PETITION for special leave to appeal from a conviction by the Supreme Court of Ceylon dated Aug. 28, 1934, whereby the first petitioner was convicted under the Ceylon Penal Code, s. 3, of voluntarily and illegally causing one Maye then with child to miscarry on Apr. 22, 1934, and was sentenced to simple imprisonment for the term of eighteen months and the second petitioner was convicted under the Ceylon Penal Code, ss. 303 & 102, of abetting the commission of the offence and of thereby causing the same and was sentenced to rigorous imprisonment for the term of eighteen months.

H. I. P. Hallett, K.C., L. M. D. de Silva, K.C., and Stephen Chapman for the petitioners.

Kenelm Preedy for the respondent.

The judgment of their Lordships was delivered by VISCOUNT HAILSHAM, L.C.

VISCOUNT HAILSHAM, L.C. : This is a case which has given their

Lordships considerable trouble. The prosecution was against the first accused for performing an illegal operation, and against the second accused for abetting him in that crime.

At the trial the learned judge gave a direction to the jury, to which exception has been taken by Mr. de Silva in a very clear and helpful argument, and in which the learned judge explained to the jury his view as to the burden of proof based upon his construction of Ordinance No. 14 of 1895, s. 106, in the Ceylon Code. That section enacts that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. With reference to that section the learned judge told the jury that :

There is a section which is really the basis of circumstantial evidence so far as it occurs in Ceylon ; that section says when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Miss Maye [the person upon whom the operation was alleged to have been performed] was unconscious and what took place in that room that three-quarters of an hour that she was under chloroform is a fact specially within the knowledge of these two accused who were there. The burden of proving that fact, the law says, is upon them, namely, that no criminal operation took place but what took place was this speculum examination.

Their Lordships are of opinion that that direction does not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge.

The summing-up goes on to explain the presumption of innocence in favour of accused persons, but it again reiterates that the burden of proving that no criminal operation took place is on the two accused who were there.

If their Lordships thought that the refusal of leave to appeal in this case could be construed as an acceptance of that doctrine, they would be very slow to reject the petition which has been brought before them. But, in fact, the circumstances of the case have been explained to their Lordships, and they are satisfied that on the facts that were explained here, there were circumstances pointing irresistibly to the guilt of the accused quite independently of this direction.

It has been repeatedly stated in a series of authorities that their Lordships do not sit as a Court of Criminal Appeal ; that the mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal. LORD SUMNER, in a well-known passage in the case of *Ibrahim v. R.* (1), pointed out, at p. 615, that :

Misdirection as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance

of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.

The latter danger, it is hoped, is sufficiently guarded against by the observations which their Lordships have thought it right to make. It has been suggested by Mr. de Silva that the judgment in the recent case of *Lawrence v. R.* (2) in some way modified or altered that statement of the law. *Lawrence v. R.* (2) is a case in which the actual decision was plainly within the authority of previous cases, because their Lordships held that sentences had been pronounced which were outside the power of the tribunal which purported to pronounce them. It may be that the precise language of the judgment may have to be considered on a more suitable occasion. It is sufficient to say that the judgment then pronounced did not purport to depart in any way from the well settled principles which have been laid down in previous authorities and cannot be allowed to be construed so as to depart from those principles.

In all the circumstances of this case their Lordships do not feel justified in humbly advising His Majesty to grant special leave to appeal, because they are satisfied that there has been no such substantial injustice, no such deprivation of the substance of fair trial as the cases show to be necessary in order to justify the granting of such leave. At the same time their Lordships want to make it clear that that refusal does not imply an endorsement of some of the language of the summing-up, language which perhaps would not seem quite so unfavourable to the accused if it is taken as a whole and not divorced from the context in which it appears. But as stated in the passages to which attention has been called the statement of the law is incorrect, and nothing that has happened on this petition must be understood as affording any approval of its language.

Their Lordships will accordingly humbly advise His Majesty that the petition be refused.

Solicitors : *Freeman & Cooke* (for the petitioners) ; *Burchells* (for the respondent).

[Reported by S. P. KHAMBATTA, Esq., Barrister-at-Law.]

FURNESS WITHY & CO., LTD. v. DUDER.

[KING'S BENCH DIVISION (Branson, J.), April 28, 1936.]

Insurance—Marine—Collision clause—Liability of insurer—Collision with Admiralty tug—Liability of insured under contract.

By a policy of marine insurance it was provided *inter alia* that "if the ship hereby insured shall come into collision with any other ship or vessel and the assured . . . shall in consequence thereof become liable to pay and shall pay by way of damages" any sum, the underwriter would indemnify the assured. The assured engaged an Admiralty tug to tow the insured ship, agreeing to make good to the Admiralty all damage suffered through injury to Admiralty property arising out of the service of the tug. The insured ship collided with the tug owing to the negligent navigation of the tug and the assured duly paid the amount of the damage to the Admiralty. The assured then claimed repayment from an underwriter :—

HELD : upon a proper construction of the insurance policy the assured was only entitled to be indemnified in respect of a liability arising in tort to pay something as a result of a collision and not in respect of a liability arising out of the towage contract. The plaintiff's claim could not therefore succeed.

[EDITORIAL NOTE. The point of this case is quite a short one. A collision having occurred by reason of the negligent navigation of an Admiralty tug, the shipowners became liable under the usual contract which must be entered into for the services of such a tug. The question then was, as there was no liability apart from the special contract, whether the insurers were liable to indemnify the owners, and this question was resolved in favour of the insurers.

FOR THE SCOPE OF THE COLLISION CLAUSE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 312, 313, paras. 436, 437, and FOR CASES, see DIGEST, Vol. 29, pp. 213-215, Nos. 1702-1716.]

ACTION to recover a sum alleged to be payable under a policy of marine insurance. The plaintiffs were the owners of the steamer "Monarch of Bermuda." By a policy of marine insurance, part of which was underwritten by the defendant, the defendant insured the plaintiffs against the perils therein set out, the policy providing, *inter alia*, that :

If the ship hereby insured shall come into collision with any other ship or vessel and the assured . . . shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured we will pay the assured . . . such proportion of such sum or sums so paid as our subscription hereto bears to the policy value of the ship hereby insured.

In 1933 the "Monarch of Bermuda" was involved in a collision with H.M. Admiralty tug "St. Blazey," which was damaged. The "St. Blazey" had been engaged by the plaintiffs on the usual terms on which Admiralty tugs are engaged from His Majesty's dockyard at Bermuda, whereby the plaintiffs had agreed to

make good to the Admiralty all damage suffered by the Admiralty through injury to Admiralty property or any other cause by reason of or arising out of or in any way

connected with the service and to indemnify the Admiralty against all liabilities and claims whether in respect of injuries to persons or property or otherwise which may be incurred by or made against the Admiralty by reason of or arising out of or in any way connected with the service.

The collision was caused entirely by the negligent navigation of the "St. Blazey." The plaintiffs became liable to pay, and paid, to the Admiralty £119 12s. 8d. in respect of the damage to the "St. Blazey," and they now claimed to recover that sum from their underwriters. They claimed from the defendant 4s. 8d.

A. T. Miller, K.C. and *Stephen Furness* for the plaintiffs: The words of the running-down clause are quite general. The plaintiffs were obliged to make the payment "in consequence of" the collision. The proximate cause of the payment was the collision: the towage contract was in the background. The words in the running-down clause were "become liable to pay," and were not limited to a liability arising in any particular manner.

H. U. Willink, K.C. and *W. L. McNair* for the defendant: The running-down clause contained a limitation of the liability, and it was only to be liability to pay "by way of damages." The liability was to arise from the collision. But in this case the plaintiffs were not to blame, and would not have been under any liability at common law as a result of the collision. The plaintiffs were bound by the towage contract to make good to the Admiralty any damage suffered through any cause. The Admiralty's claim arose in contract, and not in tort. The running-down clause covered only payments which had to be made "by way of damages," and that implied some wrongful act on the part of the plaintiffs.

BRANSON, J.: This case raises a short point upon an agreed statement of facts. [His Lordship read the statement of facts.] The amount involved is negligible. The action turns upon the wording of the running-down clause in the policy:

If the ship hereby insured shall come into collision with any other ship or vessel and the assured . . . shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum. . . .

The question here is whether the £119 12s. 8d. which the plaintiffs have paid to the Admiralty is a sum which they became liable to pay in consequence of the ship having come into collision with another ship, and became liable to pay by way of damages. Mr. Miller urges that the collision was the proximate cause of the liability on the part of the plaintiffs to pay, and therefore that it can correctly be described as the cause in consequence of which the plaintiffs became liable to pay. But my view is that the running-down clause must be read as one sentence. It does not help to divide it into two and to ask oneself whether payment arose in consequence of the collision, and was it,

if it did so arise, a payment in consequence of damage. It leads to a clearer view of the meaning of the clause to read it as it was written in one sentence and to ask oneself, "What did the parties mean? What are the circumstances that the parties contemplated?" It may be that this is no more than a case of first impression. Looking at it from that point of view, I think that the sentence means that where, as a result of the collision, there arises a legal liability upon the shipowners to pay something which may be described as damages, then the underwriters will indemnify. The expression "become liable to pay and shall pay by way of damages" indicates a method of liability arising by way of tort and not by way of contract. There is no such liability here.

I need only add that if this language in the running-down clause was sufficient to cover any sort of liability which a shipowner might pay by way of contract, the prospect for the underwriters would only be limited by the pity which the shipowners might be expected to extend.

I think the document means what the defendant says. The claim fails, and there must be judgment for the defendant with costs.

Solicitors: *Middleton, Lewis & Clarke* (for the plaintiffs). *Wm. A. Crump & Son* (for the defendant).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

ALLEN *v.* LONDON PASSENGER TRANSPORT BOARD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parc and Goddard, JJ.), **May 5, 1936.**]

Street traffic—London Passenger Transport Board—Compensation—Abolition of office—London Passenger Transport Act, 1933 (c. 14) s. 73 (4), (6).

A joint managing director of each of two omnibus companies taken over by the London Passenger Transport Board was not offered any office or employment, and his services were dispensed with on the ground that they were no longer required. The question arose whether he was entitled to have his compensation assessed under the London Passenger Transport Act, 1933, s. 73, subsect. 4 or 6 :—

HELD : compensation ought to be assessed under subsect. 6.

[EDITORIAL NOTE.] This is a question of the construction of certain subsections of the London Passenger Transport Act, 1933, s. 73, the point being whether an officer of a company which necessarily ceased to exist upon the formation of the Board had had his office abolished or whether he was a transferred officer who had suffered injury because the Board could find no further employment for him. It was argued that the employment being under the old company, the Board had no power to abolish such an office, but this argument was rejected.

FOR THE LONDON PASSENGER TRANSPORT ACT, 1933, s. 73, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 807-810.]

Case referred to :

- (1) *Rich v. London Passenger Transport Board* (1935), Mackinnon, J., July 25, 1935, *on appeal*, [1936] 1 All. E.R. 912.

SPECIAL CASE stated by the Standing Arbitrator under the London Passenger Transport Act, 1933.

By virtue of the London Passenger Transport Act, 1933, the London Passenger Transport Board acquired the businesses of the Premier Omnibus Company Limited and the Premier Line Limited, as from the appointed day, Dec. 20, 1933. Up to the appointed day the applicant was joint managing director of both companies, appointed under agreement for life and his remuneration depended on the profits made by the companies. His duties were to keep the companies' motor omnibuses and coaches in proper running order and condition, to be in charge of the garages and works, and to supervise the drivers and conductors. The Board was not prepared to carry out specifically the service agreements though the applicant was ready to do so. In fact the applicant has not been offered any office or employment by the Board.

It was agreed that the applicant was on the appointed day an existing officer or servant of the said companies and that he was transferred under sect. 73 (2) of the Act and that compensation was payable to him by the Board under the provisions of sect. 73 of the Act. The parties requested

the standing arbitrator that he should in the first instance determine the principle upon which such compensation should be assessed in an interim award in the form of a special case.

The case of the learned standing arbitrator is set out in the judgment of LORD HEWART, L.C.J.

W. T. Monckton, K.C., and *N. R. Fox-Andrews* for the respondents : The compensation payable falls to be assessed under subsect. 6 of the section. The Board has abolished the applicant's office or post, viz., that of caring for and maintaining the Premier omnibuses and coaches and supervising the companies' employees, and has dispensed with the applicant's services on the ground that they are not required. Subsect. 4 of the section does not apply to the case of an existing officer or servant who for any reason was in fact at no time employed by the Board. The applicant is an existing officer or servant who has suffered direct pecuniary loss in consequence of the Act otherwise than by abolition or relinquishment of his office or post.

R. P. Croom-Johnson, K.C., and *H. J. Astell Burt* for the applicant : The compensation payable falls to be awarded under subsect. 4. The Board has not nor had any power to abolish the applicant's office or post for the reason that such office or post was that of a managing director under contracts with the said companies. The Board has not dispensed with the applicant's services within subsect. 7 of the said section, as such dispensing with services refers to the lawful putting an end to the contract and not to a mere failure to employ. Subsect. 4 applies to any person who, being an existing officer or servant, was in fact not employed by the Board although ready and willing to accept employment. [Counsel referred to the case of *Rich v. London Passenger Transport Board* (1).]

LORD HEWART, L.C.J. : [His Lordship read the interim award and answered the questions as shown.]

I find and award : (1) that the office held by the applicant was that of managing director.

Yes.

(2) That the Board in fact dispensed with the applicant's services on the ground that they were not required.

Yes.

That subsect. 7 of the said section did not apply inasmuch as it in law only applies to an existing officer or servant who was in fact employed by the Board and whose services are dispensed with by the due and proper termination of his contract of employment.

It is not found within the statute.

(3) That the applicant has by reason of the Act suffered direct pecuniary loss, viz., the loss of his remuneration as a managing director, in consequence of the said Act otherwise than by reason of the abolition or relinquishment of his office.

No.

(4) That the decision in *Re Rich and the Board* (1) applies to the case of a person who is offered and refuses to accept employment by the Board, but not to the case of a person who is willing to accept but is not offered by the Board any such employment.

The decision applies to both cases.

(5) That so far as concerns the said direct pecuniary loss suffered by the applicant, the said falls to be awarded under subsect. 6 of the said section and that so far as concerns any other loss suffered by the applicant, he is entitled to compensation and the said falls to be awarded under subsect. 4 of the said section.

The claim arises out of the dispensing with the applicant's services and is to be dealt with under subsect. 6.

The question for the opinion of the court is whether in respect of the said contentions I have come to a right determination in point of law, and if not, upon what basis I am to assess the sum which I am to award to the applicant as compensation.

Subsect. 6.

Leave to appeal refused.

Solicitors: *J. R. Cort Bathurst* (for the applicant); *Bircham & Co.* (for the respondents).

[Reported by H. P. LANSDALE RUTHVEN, ESQ., *Barrister-at-Law.*]

J. P. HUGHES (H.M. INSPECTOR OF TAXES) v. THE BANK
OF NEW ZEALAND.

THE BANK OF NEW ZEALAND v. J. P. HUGHES
(H.M. INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **May 1, 1936.**]

Income Tax—Non-resident trader—Interest on government securities—Interest on securities of foreign and colonial companies—Expenses of earning profits exempt from tax—Income Tax Act, 1918 (c. 40) s. 46, Sched. C, r. 2 (d), Sched. D, Cases I and II, rr. 3, 5.

The Bank of New Zealand had a branch in London and was assessed in respect of profits arising from the trade carried on there. 5 per cent. War Loan, 3 per cent. India Government Stock and securities of two colonial companies had been purchased out of the floating capital of the London branch. The interest on the War Loan was paid without deduction of tax and the interest on the other securities had been paid less tax but the amount of the tax had been repaid on the ground that there was no residence in the United Kingdom:—

HELD: (i) the interest on the War Loan, the India Government Stock and the securities of the two colonial companies were exempt from income tax.

(ii) the proportionate amount of expenses incurred by the bank for the purpose of earning profits which were exempt from income tax were properly included in arriving at the balance of profits and gains.

(iii) Sched. C, r. 2 is incorporated into the Miscellaneous Rules applicable to Sched. D, by rule 7 (2) thereof.

[EDITORIAL NOTE. The position of a company having only a branch in the United Kingdom as to liability to income tax is treated quite fully in this case, especially as regards any investments that may have been made out of the assets of the branch. Expenses incurred in the earning of the profits exempt from taxation may be treated as a deduction in taking the usual trading account.

FOR THE LAW ON THE POINTS RAISED, see HALSBURY, Hailsham Edn., Vol. 17, p. 11, para. 10, and p. 380, para. 779; AND FOR THE CASES, see DIGEST, Vol. 28, pp. 32-37, Nos. 166-198; AND FOR THE INCOME TAX ACT, 1918, s. 46, Sched. C, r. 2 (d), Sched. D, Cases I and II, rr. 3, 5, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, pp. 444, 555, 563, 566.]

Cases referred to:

- (1) *Liverpool & London & Globe Insurance Co. v. Bennett*, [1913] A.C. 610; 6 Tax Cas. 327; 28 Digest 60, 304, 305;
- (2) *Cadbury Bros., Ltd. v. Sinclair*, [1934] 2 K.B. 389; 18 Tax Cas. 157; Digest Supp.
- (3) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; 15 Tax Cas. 266; Digest Supp.
- (4) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 5 Tax Cas. 215; 28 Digest 57, 290.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Bank of New Zealand was assessed to income tax under the Income Tax Act, 1918, Sched. D, Case I, in respect of the profits arising

from the trade carried on by a branch in the United Kingdom. Among the assets held which had been purchased out of the floating capital of the London branch were included holdings of (1) 5 per cent. War Loan; (2) India Government 3 per cent. Stock; and (3) Securities of two colonial companies all the interest upon which was included in the trading receipts in the profit and loss account of the London branch. The interest on the War Loan was paid without deduction of tax, and was not assessed to tax under Sched. D, Case III, r. 1 (f). The interest on the India Government Stock and on the securities of the two colonial companies had been taxed by deduction in the ordinary course, but the tax deducted therefrom had been repaid to the bank on the ground that it was not resident in the United Kingdom.

The special commissioners, on appeal against the assessments, decided :

1. the produce of the bank's holdings was a trading receipt and the cost of earning it was a trading expense, of the business carried on by the bank in London.

2. apart from any exemption, interest and dividends on securities and possessions out of the United Kingdom which form part of the trading receipts of a business carried on in the United Kingdom can be included in the computation of the profits of that business under Sched. D, Case I, where they have not suffered tax under Case IV or Case V.

3. the exemptions in the Income Tax Act, 1918, s. 46, and Sched. C, r. 2 (d), must be regarded as conferring immunity from tax on the interest on the 5 per cent. War Loan Stock and the India 3 per cent. Stock—whether as interest or as a component part of the profits of the bank's business.

4. as to exemption of interest or dividends on the stocks, shares or securities of foreign or colonial companies no question can arise as to the exemption of such income except as a component part of the profits of a trade carried on in the United Kingdom; the Miscellaneous Rules of Sched. D, r. 7 (2) must be construed as applying Sched. C, r. 2 (d), to dividends of foreign and colonial companies, and therefore the dividends on the stock of the two colonial companies, as well as those on the 5 per cent. War Loan and the India 3 per cent. Stocks, must be excluded from the computation of the bank's profits for assessment under Case I.

5. the bank was entitled to deduct in its Case I computation the whole of the expenses of the trade carried on by it in London, notwithstanding that some of the receipts earned were excluded on the ground of exemption.

6. only the actual cost incurred by the bank, whether in London or New Zealand, in earning the trading receipts of the London branch could be set off against those receipts in arriving at the assessable profits arising to the bank from the trade exercised by it in London, and that no further deduction can be allowed on the ground that a notional profit should be attributed to the bank's operations in New Zealand.

The Attorney-General (Sir Donald Somervell, K.C.), and Reginald P. Hills for the appellant.

A. M. Latter, K.C., and J. S. Scrimgeour for the respondents.

LAWRENCE, J. : In this case I find myself in agreement with the able and elaborate decision of the commissioners, both as to their conclusions and as to the majority of their reasoning with perhaps the exception

that I do not altogether agree with some of their observations as to the Miscellaneous Rules applicable to Sched. D, r. 7. But as the case is a case of importance, and in deference to the arguments which have been addressed to me on behalf of the Crown, I will state my judgment on the various points as shortly as I can. The questions which are raised are four in number. The first question, is whether an exemption is conferred by the Income Tax Act, 1918, s. 46, upon interest payable upon War Loan held by the respondent bank, which is admittedly a bank which, though it carried on business in the City of London, is not ordinarily resident for the purposes of the Income Tax Act within the United Kingdom. The Crown contend that that section only exempts interest as such and does not exempt interest if it is held by a trader, and if it can be assessed under Sched. D, as one of the component parts of a trade. They say that under the Income Tax Act, 1918, s. 49 (2), it is to be assessed under Sched. D, Case III, and they say that owing to the fact that it has been held that the Crown can elect as between cases, although it cannot elect as between schedules, they are, therefore, entitled to elect to tax this interest under Case I as a component part of a trade. Therefore they argue that sect. 46 ought to be read as only referring to interest which they call interest as such ; or, in other words, interest which is held by a person who is not a trader. As I have said, I agree with the opinion of the commissioners that there is no foundation for that construction of sect. 46. In the first place, it involves, in my opinion, introducing words into the section which are not there and in a taxing Act that is peculiarly repugnant to the principles of interpretation which have been laid down. In the next place, it is clear from the terms of sect. 46 that it is general and does not only cover War Loan ; it is a power given to the Treasury to

issue any securities which they have power to issue for the purpose of raising any money or any loan, with a condition that the interest thereon shall not be liable to tax or super-tax, so long as it is shown . . . that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom.

Therefore, the section applies not only to War Loan but to any other loan which is issued under that power. It is only with reference to that War Loan that Sched. D. is brought into operation by reason of the Income Tax Act, 1918, s. 49 (2). It appears to me, therefore, that it is impossible to read sect. 46 as applying only to interest. The Crown contend that sect. 46 applies only to interest which is held by a trader. Their argument upon this aspect of the matter seems to me to involve giving different meanings to the word "interest" according as it is interest upon War Loan and interest upon other securities issued under that power. If it is War Loan, it is only covered by the section if it is War Loan held by a private holder. If it is interest on other public securities, it is equally interest within the meaning of the section if the

person who holds the securities is a trader. In my judgment that is an interpretation which cannot possibly be given to the word "interest" under the section. Also it appears to me that the contention of the Crown alters and adds to the condition which the section permits the Treasury to attach and alters it from being a condition "so long as the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom" into a condition "so long as the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom and those persons are not traders." Again it is an addition to the words in the operative part of the section and, in my judgment, there is no foundation for such a construction. Now I was referred by the Attorney-General to the history of the section, but I find no reason for thinking that the history leads me to the conclusion that the Crown's interpretation of the section ought to be put upon it; on the contrary, I think that the circumstances in which the section was introduced appear to make it more probable that the wider interpretation of the section was intended. Then the Crown rely upon the *Liverpool & London & Globe* case (1), but in my judgment that case has no real application to the present case, because there what HAMILTON, J., as he then was, was dealing with was a subject-matter of tax which fell within Case I but did not fall within Cases IV and V. What he said was that the taxpayer could not avoid tax under Case I simply because the source of revenue was not taxed under Cases IV and V. It was an illustration of the power of the Crown to elect as between cases. But it appears to me to have no relevance to the present case where there is a special section dealing particularly, as sect. 46 does, with this particular source of income. I was referred by counsel for the bank, Mr. Latter, to the *Cadbury* case (2). That was decided with reference to the Rules applicable to Cases I and II, r. 5, and rule 5 (1) is in these terms:

The computation of tax shall be made exclusive of the annual value of lands, tenements, hereditaments, or heritages occupied for the purpose of the trade or profession and separately assessed and charged under Sched. A.

It was a case in which the lands of the taxpayer were exempt from every form of taxation, and it was said that the computation of tax in the case of this taxpayer could not be made exclusive of the annual value of those lands, because they were not separately assessed and charged under Sched. A. But the Court of Appeal held that so to read the rule had the effect of infringing the exemption which was conferred by the statute of 1660. It appears to me that no reliance can be placed by the respondents upon that in any case in this case here, because here the question is whether the exemption exists. There the exemption admittedly existed and the reliance upon the case seems to me, with respect to the argument which was presented to me, to involve a *petitio*

principii. For those reasons I am of opinion that the Income Tax Act, 1918, s. 46, clearly applies to interest on War Loan, the beneficial ownership of which is in the respondent bank.

The second point arises with reference to interest upon Indian securities, and as to that the commissioners have held that the interest in question falls within the protection of Sched. C, r. 2 (*d*), which provides that :

No tax shall be chargeable in respect of the interest or dividends on any securities of a foreign state or a British possession which are payable in the United Kingdom, where it is proved . . . that the person owning the securities is not resident in the United Kingdom.

The argument for the Crown is that rule 2 (*d*) takes the case of the interest on these Indian securities entirely out of Sched. C, and leaves them at large and then they can be dealt with under Sched. D as a trading receipt in the hands of a trader, and in that way rule 2 (*d*) has no effect upon such interest. I think there is a variety of answers to this argument. It is clear, in my judgment, that such interest falls within Sched. C, and I think that it was almost conceded by the Crown that it did fall within Sched. C, but for the provisions of rule 2 (*d*). It does not seem to me, whether you say that Sched. C, r. 2, is a rule of exclusion or a rule of exemption, that it makes any difference ; in either case the intention of the statute must be the same, that that source of revenue, is to be exempted or excluded from the subject matter of tax.

Then, as Mr. Latter has pointed out, the rule itself, does not refer only to tax under Sched. C ; it refers to any tax, and it says that no tax shall be chargeable in respect of the various matters dealt with in rule 2 and that that is the true interpretation of the words " no tax " is indicated by rule 3 which follows immediately where " tax " under Sched. C is specifically referred to and contrasted with " tax " under Sched. D. I am of opinion, therefore, that so far as the interest on Indian securities is concerned they are exempt and no tax can be charged in respect of them by virtue of Sched. C, r. 2.

The third heading is interest on securities of foreign and colonial companies. As to that, it is true that there is possibly more doubt. As the commissioners have said it is possibly arguable. But although they set out the arguments for the Crown and no arguments against those arguments, I am of opinion that their conclusion is right and that that was the only part of their reasoning which I thought was open to observation. The question arises upon the construction of the Miscellaneous Rules applicable to Sched. D, r. 7. The rule provides that :

(1) Where any interest . . . payable out of or in respect of the stocks, funds, shares, or securities of any foreign or colonial company . . . are intrusted to any person in the United Kingdom for payment to any persons in the United Kingdom, the same shall be assessed and charged to tax under this schedule by the special commissioners.

(2) All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person . . . for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under this rule.

The question, and the only question, is whether rule 7 (2) incorporates Sched. C, r. 2 (d). In my opinion it does. I think it falls within the words "all provisions of Sched. C, relating to the tax to be assessed and charged in respect of those dividends." Sched. C, r. 2, is a provision of Sched. C, and it does relate to the tax to be assessed and charged none the less for the fact that it exempts the particular subject matter from the tax to be charged in certain instances when the securities are held by persons not resident in the United Kingdom. Mr. Hills, on behalf of the Crown, submitted that it was impossible to imagine that the draftsman of para. (2) could have intended that paragraph to apply to anything except the mere machinery provisions of Sched. C. But I find myself in disagreement with him as to that. In my judgment any draftsman who put in that paragraph would, in the ordinary course, have looked to see what were the rules applicable to Sched. C. The second rule he would have found was a rule which was solely concerned with exempting certain sources from taxation. I am also of opinion that there is nothing very peculiar, as was suggested by the commissioners, in exempting the interest of these colonial companies' securities, and I think that the exemption conferred by Sched. C, r. 2 (c) particularly indicates that there was no peculiarity in it. It would be natural, and it is possible, that that exemption might have existed apart from the express provisions of rule 2 (c); but rule 2 (c) being there in express terms, and providing that: "No tax shall be chargeable in respect of the stock, dividends or interest of any accredited minister of any foreign state," it seems to me to be quite natural why that should be applied to rule 7 (2) to the interest arising upon the securities of colonial companies. Now Mr. Hills in his argument, referred me to the *Salisbury House* case (3), and to LORD ATKIN's judgment at p. 456. Mr. Hills relied upon the observations of LORD ATKIN there where he said he found it

impossible to conceive that these various commissioners had an option to encroach upon the duties of one another, or that the taxpayer was exposed to having his income freed from the restrictions and exemptions imposed by statute under one schedule in order to be subject to a different set of restrictions and exemptions imposed by statute under another schedule.

Those observations, of course, were made perfectly generally without any particular reference to a particular provision in the Acts, and do not exempt the court from construing the particular specific words of this paragraph, and it still remains for me to construe the words: "All

provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends," etc. I have to see, without any general considerations, what those words mean, and I have already expressed my view as to what they do mean.

Then next it was argued on behalf of the Crown that history made it impossible to adopt that interpretation, but I see no reason for accepting that view. This para. (2), I think I am right in saying, was only introduced in 1918, and it may very well have been that it was the intention in 1918 to apply the exemption which is contained in Sched. C, r. 2, to the interest on colonial stocks which, up to that time, had not been exempt. The last argument on behalf of the Crown was, as I understood it, this, that if this interest was charged under Sched. D, Case IV, there would have been no reason for the exemption by reference, because Case IV has always been read as applying only to non-residents. I do not think that that is any ground for not putting upon the words of para. (2) the interpretation which I think they naturally bear, and I therefore hold, in agreement with the commissioners, that para. (2) does incorporate the provisions of Sched. C, r. 2 (*d*).

This brings me to the last point, which is whether, if these various sums of interest are exempt when they are brought into the account for the purpose of arriving at the balance of profits or gains under Sched. D, Case I, the proportionate amount of expenses which were incurred for the purpose of earning these exempt profits ought to be excluded for the purpose of arriving at the balance of profits or gains. The commissioners have said that they had some sympathy with the contention, but were unable to accede to it. Of course it is a possible view that it would be more reasonable to exclude expenses so incurred. But what the court has to do in dealing with the balance of profits or gains is to look at the expenses which are expressly allowed and it is found that the way in which the matter is dealt with is by the Rules applicable to Cases I and II of Sched. D, r. 3, where it is said :

In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation :

that is to say, any disbursement or expense which is wholly or exclusively laid out for the purposes of trade may be deducted. In my view the commissioners in this case have impliedly, at any rate, found that the expenses which have been attributed by way of agreement to the profits which were earned by the respondent bank in London were expenses which were exclusively laid out for the purposes of the trade which the respondent bank carried on in London, and in view of that implied finding, if it is only implied—it is, at any rate the basis of their

judgment—I am of opinion that there is no ground for excluding those expenses merely because some part of the profits which those expenses had been incurred to earn are exempt from income tax. The contention of the Crown is based upon reading rule 3 of the Rules applicable to Cases I and II, as though it read: “Any disbursements or expenses not being money wholly or exclusively laid out or expended for the purposes of earning profits brought into charge,” but that is not what the rule says, and again the words of the rule must be strictly adhered to. The expenses may be laid out for the purposes of trade, and undoubtedly were apparently in this case laid out for the purposes of the trade, although they earned profits which, by reason of exemption, are not brought into charge. Mr. Hills in his reply, relied upon the case of *Strong & Co., Ltd. v. Woodfield* (4), but in my judgment that case has really no bearing upon the present question. It was principally an authority that the damages and costs which were sought to be deducted in that case were not incurred for the purposes of the trade. They were too remote from the trade of the brewer, who was the taxpayer, being the expenses of paying for an accident to a visitor to a tied house belonging to the brewer. The particular passage which Mr. Hills relied upon in LORD DAVEY’s judgment also seems to me not to help him in this case. LORD DAVEY said at p. 453:

I think that the payment of these damages was not money expended “for the purpose of the trade.”

Of course, in the present case, if there had been a finding that the expenses now in question had not been expended for the purpose of the trade carried on by the respondent bank there would be an end of the matter. LORD DAVEY goes on:

These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

LORD DAVEY does not say: “for the purpose of earning profits brought into charge”; but “for earning the profits of the trade.” In my opinion the contention of the Crown involves really re-writing the terms of rule 3 of the Rules applicable to Cases I and II. I ought to say, perhaps, that the cross-appeal was expressly abandoned before me. For those reasons, therefore, I am of opinion that the decision of the commissioners on all these points was right, and ought to be affirmed, and the appeal and cross-appeal will be dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Linklaters & Paines* (for the respondents).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

LEESON v. LEESON.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), April 24, 1936.]

Contract—Payment—Appropriation—Payment by debtor of a lesser sum than that due on two separate debts—Appropriation to one of the debts—Necessity for communication to the creditor.

Upon the separation of a husband and wife, the husband undertook to pay to the wife £3 a week for the maintenance of herself and their child. Later, by a written contract between the parties the husband agreed to pay to the wife £300 in respect of a house by weekly instalments of £2, and on the failure of the husband to pay any one such instalment of £2 he was to become liable forthwith for the whole balance then outstanding. Subsequently, the wife was granted a decree *nisi*, and the husband, being advised that he was no longer liable for the £3 maintenance, sent £3 weekly instead of the £5 due under the two agreements. In the envelope containing the first weekly payment of £3 the husband enclosed a slip of paper with the words written on it, "This is for the house and Barry" (Barry was the child of the marriage). The wife thereupon brought an action for payment of the balance of the £300 due under the written agreement in respect of the house. At the hearing in the county court the wife stated that no such slip of paper was contained in the envelope which she had received with the first payment of £3. Although no notice to produce this slip was given, the county court judge admitted secondary evidence of the husband as to the contents of the slip of paper, and, holding that there had been an effective appropriation of the £2 to the payment due in respect of the house, gave judgment for the husband :—

HELD : (i) secondary evidence as to the contents of the slip was not admissible.

(ii) the mere intention of the husband to appropriate the payment of £3 to the debt for the house and the maintenance of the child of the marriage, uncommunicated to the wife, did not amount in law to an appropriation.

[EDITORIAL NOTE. The point of interest here is the attempted appropriation of a payment by the insertion of a note in the envelope in which the payment was sent. It appearing that the payee merely took the cheque out of the envelope and was quite unaware of there being any note at all, there was no communication of the intended appropriation to the payee, and it was not, therefore, binding.

AS TO APPROPRIATION OF PAYMENTS BY DEBTOR, see HALSBURY, Hailsham Edn., Vol. 7, p. 244, para. 335; and FOR THE CASES, see DIGEST, Vol. 12, pp. 474, 475, Nos. 3871-3883, and pp. 482, 483, Nos. 3945-3960. AS TO SECONDARY EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 13, p. 651, para. 719, and FOR THE CASES, see DIGEST, Vol. 22, pp. 237, 238, Nos. 2118-2130.]

Case referred to :

(1) *Parker v. Guinness* (1910), 27 T.L.R. 129; 12 Digest 482, 3946.

APPEAL from a judgment of His Honour JUDGE DRUCQUER, delivered at Rugby County Court on Nov. 29, 1935.

The plaintiff was formerly the wife of the defendant. Prior to Mar. 27, 1933, the parties had agreed to separate and by a verbal agreement the

defendant, the husband, undertook to pay to the wife the sum of £3 per week for the maintenance of herself and the daughter of the marriage, Miss Barry Leeson. Later, after the parties had separated, on Mar. 27, 1933, by a written contract the husband agreed to pay to the wife £300 in respect of premises, the Thatched House, Kilsby, which was the joint property of the parties, by weekly instalments of £2. The contract contained a clause whereby on the failure of the defendant to pay any instalment he was to become liable to pay forthwith the whole balance of the £300 then outstanding. From Mar., 1933, the husband was thus liable to pay, and did pay, to the wife £5 a week : £3 in respect of maintenance of herself and their daughter, and £2 under the contract in respect of the house. Later, in divorce proceedings the wife was granted a decree *nisi* on Mar. 22, 1935, which was made absolute on Oct. 7, 1935. When the next weekly payment fell due, after the pronouncement of the decree *nisi*, the wife received from the husband the sum of £5, but in the following week, on Apr. 2, 1935, the sum of £3 was sent to her by the husband and thereafter the amount she continued to receive weekly was £3. The wife thereupon brought an action for payment of the balance of the £300 outstanding under the contract of Mar. 22, 1933, namely, £92.

At the hearing in the county court the wife proved the contract in respect of the house and the fact that she had not received the full payment of £5 a week, as from Apr. 2, 1935, which she claimed showed a failure on the part of the husband to pay the instalment of £2 a week under the contract. In the course of cross-examination the wife was asked whether she had received a slip of paper in the envelope containing the first payment of £3, on which was written : "This is for the house and Barry.—Billy." The wife stated that she had not received such a slip of paper in the envelope. In his evidence the husband said that he had been advised by his counsel in the divorce proceedings that on the pronouncement of the decree *nisi* he was no longer liable under his oral agreement to pay maintenance and that, although he had sent £5 in the first payment he had made after the decree, having subsequently further consulted his counsel, he had sent £3 only when the next payment became due, and thereafter £3 weekly. With the first payment of £3 he had enclosed a slip of paper on which he had written : "This is for the house and Barry—Billy," and it was contended that by this he had appropriated the sum of £3, as to £2 for the amount payable under the contract in respect of the house and as to £1 for the maintenance of Barry, his daughter. The husband had not given any notice to the wife to produce the slip of paper which he claimed to have sent to her with the first payment of £3. The county court judge admitted the evidence of the husband regarding the contents of the slip of paper which he stated he had enclosed in the envelope, and said that he

accepted the evidence of the husband on this point and also believed the wife when she stated she had not received the slip. He said: "I think the explanation is that she tore up the envelope without noticing the slip." He found that the husband had appropriated £2 of each £3 he sent to the wife in respect of the debt due on the house, and added:

Had there been no slip enclosed, I should still have considered that, having regard to the advice received when he consulted his counsel in the divorce proceedings and subsequently, the reasonable inference which was to be drawn was that the husband had appropriated the payment in the way which he had stated on the slip of paper.

Judgment was given for the husband, and the wife appealed.

F. D. L. McIntyre for the appellant.

Harold Eaden for the respondent, referred to *Parker v. Guinness* (1).

GREER, L.J.: This is a dispute between husband and wife. There was an express agreement for the payment by the husband of a sum of £300, by instalments of £2 per week, and an oral agreement for maintenance of £3 a week for the wife and the daughter of the marriage. Later, after divorce proceedings the husband was advised that he was not liable for maintenance after the decree *nisi* had been pronounced. The action was for the balance of £300 which amounted to a sum of £92, payable under a written agreement of Mar. 27, 1933. The learned judge found for the husband and that he was entitled to rely on secondary evidence as to the contents of the slip of paper which he stated he had enclosed in the envelope containing the first payment of £3 per week. I am inclined to think that had this document been proved this might have been an appropriation on the part of the husband. Unfortunately there is no evidence which could have been received by the learned judge as to the contents of this document. He was wrong in law in attaching any weight to the secondary evidence as to its contents and accordingly the only evidence was that the husband had sent the wife £3 each week, the exact amount of the sum due for maintenance under the separation agreement. He was wrong in law in finding that the husband made an appropriation by his intention to appropriate. There must be something more than this. In the absence of the slip there was no evidence of appropriation. The judge accepted the evidence of the wife and that she had not received the document. On the evidence the learned judge ought to have given judgment for the amount claimed and we give judgment for that amount.

GREENE, L.J.: Appropriation cannot be inferred from some undisclosed intention in the mind of the debtor. Where a debtor owes his creditor two separate debts, he must on making a payment of a lesser sum than the amount of the debts, not only form an intention to

appropriate the payment, but must communicate that intention to the creditor.

TALBOT, J. : I agree.

Appeal allowed.

Solicitors : *Lawrence & Mavro* (for the appellant) ; *Thomas Coates & Co.* (for the respondent).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

RODEN v. BRETT.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), April 30, 1936.]

Gaming—Gaming-house—Person found on premises—Innocent purpose—Conviction—Unlawful Games Act, 1541 (33 Hen. 8, c. 9), s. 9.

Police officers raided a public-house where betting was being carried on. Among other persons, they arrested a builder who was on the premises solely for the purpose of doing repair work, and charged him under the Betting Act, 1853, with unlawfully resorting to a house for the purpose of betting on horse-racing. Later this charge was dropped and replaced by a charge under the Unlawful Games Act, 1541, s. 9, of unlawfully resorting to a common gaming-house. Justices, although they found that the defendant was on the premises for a wholly innocent purpose and knew nothing about the betting, convicted him and bound him over not to resort to gaming-houses, ordering him to pay 4s. costs:—

HELD : there could be no conviction or binding over of the defendant after a finding that he was on the premises for a proper and innocent purpose. The conviction must, therefore, be quashed.

[EDITORIAL NOTE.] This case clears up the position arising under *Murphy v. Arrow*, (1). It is now clear that persons found in a gaming-house may be arrested and bound over without positive evidence that they have been concerned in the gaming ; but, if there is evidence that they are there for an innocent purpose, then they are free from prosecution. The position was said to be so in *STONE'S JUSTICES' MANUAL*, 1936, pp. 836, 837, and this case and the judgment of DU PARCQ, J., in particular, confirm the statement of the law there submitted.

FOR THE LAW ON THIS MATTER, see HALSBURY, Hailsham Edn., Vol. 15, p. 498, para 900 ; and FOR THE CASES, see DIGEST, Vol. 25, p. 442, No. 362, and p. 451, No. 421.]

Cases referred to :—

- (1) *Murphy v. Arrow*, [1897] 2 Q.B. 527 ; 25 Digest 442, 362.
- (2) *Davis v. Sly* (1910), 26 T.L.R. 460 ; 25 Digest 451, 421.
- (3) *Vines v. Rawthorne* (1933), *Times*, Apr. 7.

APPEAL by way of case stated from a conviction by justices sitting at Bognor Regis. The appellant was convicted of unlawfully resorting

to a common gaming-house and bound over not to frequent or resort to gaming-houses.

On Oct. 16, 1935, the appellant was doing some building repairs at the Crown Inn at Bognor Regis on the instructions of the owners. He was in the bar having a drink by himself when the police entered and he, along with other persons, was arrested. The appellant was searched and a pack of playing cards and four entry forms for football pools were found upon him. He explained, and it was later proved, that he was an amateur conjurer and the cards were a special pack for this purpose. Despite his protests to the police inspector, saying that he knew nothing about any betting on the premises, he was put in a lorry and taken to the police station, and was charged under the Betting Act, 1853, with unlawfully resorting to a house for the purpose of betting on horse-racing. He was released on bail and later charged with this offence on a summons. About a week before the hearing he was served with another summons charging him with unlawfully resorting to a common gaming-house under the Unlawful Games Act, 1541, s. 9. The charge under the Betting Act, 1853, was at once withdrawn.

The case was opened on the second summons. The prosecution and the justices accepted the appellant's evidence that he did not know of any gaming on the premises, was unaware of any facilities for betting, and was there only for the purpose of working. He was, nevertheless, bound over in the sum of £5 not to resort to gaming-houses or to play any unlawful game.

The defendant appealed.

Harold J. Brown for the appellant: The justices were wrong in convicting and binding over the appellant when it was proved to their satisfaction that he was innocently upon the premises without knowledge that there was gaming going on.

Geoffrey Lawrence for the respondent: The police, in raiding these premises, did so as the result of observations kept upon them. The appellant was before the justices because he was found in a common gaming-house.

LORD HEWART, L.C.J.: I am very clearly of the opinion that this appeal ought to be allowed. The matter which the case discloses is so outrageous that it is difficult to speak of it with the patience and restraint suitable for a court of law. The appellant was charged with having been found unlawfully resorting to a certain gaming-house, namely the Crown Inn at Bognor Regis, and the justices convicted the appellant and bound him over in the sum of £5 not to resort to gaming-houses henceforth or to play any unlawful game, and ordered him to pay 4s. costs. The facts which are found in this case as having been proved or admitted are, *inter alia*, that on Oct. 15, 1935, certain police officers, with a police inspector, entered the building under a warrant under the

Betting Act, 1853. That was to authorise the inspector to arrest and bring before the justices persons resorting for the purpose of betting. At the time when the police entered, the appellant was, on the invitation of the manager, having a drink by himself. I will read the words of the case stated: "There was nothing known about the appellant nor was there anything found on any other person which connected the appellant with any gaming of any sort, whether on the premises or elsewhere." More than that, he said to the inspector, "I am only working here," and the inspector had the courage to reply: "That does not matter. You are on the premises." He was there in fact in the course of his work as a builder. The case goes on to find that this appellant had never been on the premises except for the purposes of his business as a builder. He had been there in September for the purpose of doing certain repairs which he had been asked to do. There remained some additional work on the outside of the premises and on this day he had gone to the inn to do that work. The case finds as a fact that the appellant, apart from that matter, had never entered the premises for any purpose whatever. When the police officers entered the premises, the appellant was having a drink on the invitation of the manager, who had called him in from where he and two workmen had been working. He had been in the bar two or three minutes. Notwithstanding all that, the appellant was arrested, put in a lorry with certain other persons found on the premises, taken to the police station and there charged with unlawfully resorting to a common gaming-house. The case states: "He clearly did not know of any betting on the premises and did not know that there were facilities thereon for betting." He was served with a summons for unlawfully resorting to a common gaming-house, and that summons was proceeded with although, as the case finds, the appellant was a person of good character and had never before been charged with any offence. The inspector admitted in the witness-box, under cross-examination, that he neither knew nor had heard anything to his discredit. It is admitted at the bar that this unfortunate appellant was to all intents and purposes in the position in which a doctor would have been if, at the time, he had been attending a sick child. In that state of the evidence, the solicitor conducting the prosecution read the headnote of the case of *Murphy v. Arrow* (1) and assured the justices that they were entitled to convict the appellant and to bind him over, notwithstanding the facts and that he had established the innocent purpose—which was the only purpose—for which he was there. Having heard that argument, the justices came to the conclusion that they ought to convict, and they did convict, and they bound him over and ordered him to pay 4s. costs.

If ever there was a case which has made it clear that a little learning is a dangerous thing, this is that case. If someone had taken the trouble

to look beyond the headnote, he would have seen the ludicrous nature of the task which the justices were invited to perform. In that case some eighty-eight men, in addition to the appellant, being arrested at a gaming-house in Soho, evidence was given as to what was going on on those premises. That was the only evidence. No answer was offered on behalf of the appellant or his companions, and in that state of the case the magistrate bound the appellant over—ordered the appellant to be bound over in his own recognisances. The late Mr. Danckwerts argued for the respondents (at p. 531) that :

being found on the premises is some evidence of playing. The magistrate has a discretion, and if he thought it was not made out that the man was there for the purpose of playing, he would discharge him.

In this case it was made out that the defendant was there, not for the purpose of playing, but for the purpose of his legitimate work as a builder. If, apart from that case, those who were responsible for these disgraceful proceedings had taken the trouble to look at the statute, they would have found that it is unlawful to use and haunt at houses of a certain kind, and that the statute requires certain things to be done not only by the keepers of the houses, but by the persons there haunting, resorting and playing. When those persons are brought before justices, it may be directed that the persons there so found may be bound over at the discretion of the justices, no more to play, haunt, or exercise from thenceforth in any of the said places. LINDLEY, M.R., paraphrases that by saying (at p. 532) that the justices were entitled to bind over such persons—that is, persons found in gaming-houses—to put it shortly, not to do it again.

Incredible as it may appear, although these justices were apparently satisfied that this appellant was not on the premises for the purpose of any unlawful gaming but for the lawful pursuit of his own business, they both convicted him and bound him over. They have bound him over not to do again that which he was not doing. They have expressly convicted a man whom they found to be innocent. It is strange that in 1936 such a shocking position can arise. It is really a disgrace. I refrain from saying more, lest I might use language not proper to a judicial proceeding. It may well be that when the police were fully in possession of all the facts, they persisted in the prosecution and pressed for a conviction in the hope that other proceedings might be prevented. If that was the idea, it is to be hoped that that object will be unsuccessful.

It is perfectly obvious that this appellant had established his innocence to the satisfaction of the court, and in these circumstances it is an outrage to convict him and bind him over. The appeal will be allowed and the conviction quashed.

DU PARCQ, J. : I agree. I only wish to add this. I have taken the opportunity of looking at the book, which is familiar to all justices, known as *STONE'S JUSTICES' MANUAL*, 1936, at page 836, and when one looks at that page, it seems to me that the justices were led into this error. There is a note at that page referring not only to the case which has been referred to to-day, but also to the Act passed in 1853 and other statutes. *Murphy v. Arrow* (1), cited to-day, is there cited, and then—dealing more particularly with the Betting Act, it is true—the editors refer to the case of *Davis v. Sly* (2). It was an action for false imprisonment heard in 1910 by DARLING, J., as he then was, and he was more particularly considering that Act. Considerations not very different from those before us arose, and in that case DARLING, J., held that the power of arrest of the police was limited to persons found on the premises for the purpose of betting. With regard to the analogy which appeared absurd to my Lord, DARLING, J., said that :

it seemed that the power to arrest must be limited to that of arresting persons found on the premises for the purpose of betting ; a doctor, for instance, found on the premises attending the proprietor could hardly be arrested.

In *Vines v. Rawthorne* (3) damages were recovered against a police superintendent for arresting a man found on the premises who was not there for the purpose of betting. The learned editors of *STONE* say :

It seems questionable whether, having regard to the true construction and intent of the statutes, and to the form of the warrant, the police are justified in arresting such persons as are innocently upon the premises.

I think that the learned editors state the proposition modestly. I am glad to know that in future editions our decision will make that clear which it seems to me ought never to have been in doubt.

GODDARD, J. : I agree with my Lord that these proceedings are an outrage and shocking. Even assuming that there was some excuse for the appellant's arrest, what excuse there was for taking out the summons a month afterwards, when the police had been able to satisfy themselves of the *bona fides* of the appellant—which they admitted—I really cannot understand. It seems that some further enquiry is necessary.

Appeal allowed with costs.

Solicitors : *Leslie Field, Prior & Co.* (for the appellant), *J. E. Dell & Loader*, Shoreham-by-Sea (for the respondent).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

Re THOMPSON, PUBLIC TRUSTEE *v.* HUSBAND.

[CHANCERY DIVISION (Clauson, J.), April 30, May 6, 1936.]

Executors—Administration—Liability of real estate for payment of legacies—Administration of Estates Act, 1925 (c. 23), s. 34 (3), Sched. I, Part II, paras. 1, 2.

Testator by his will bequeathed an annuity and empowered his trustees to set aside a fund to secure the same. He then gave a number of pecuniary legacies and the residue of his estate to two charities. By a codicil he gave a further legacy and declared that the legacies were to be paid free of legacy duty. The personal estate was insufficient to provide for the legacies and annuity :—

HELD : (i) the annuity was a legacy and the legacy duty payable in respect thereof was payable out of the residuary estate.

(ii) the Administration of Estates Act, 1925, has not altered the rule in such a case that the legacies are, in the absence of a special direction in the will, payable primarily out of the personal estate, and not rateably out of the personality and realty.

Form of order as to application of assets in such case.

[EDITORIAL NOTE. The contention here raised was that the Administration of Estates Act, 1925, s. 34 (3) and Sched. I, Part II, had altered the rule of administration as laid down in *Re Boards, Knight v. Knight* (3) and rendered the legacies payable rateably out of personality and realty as out of a mixed fund. The effect of such an alteration would increase the amount of estate duty payable by the legatees, as in so far as their legacies were paid out of realty they would have to bear the estate duty.

AS TO THE LIABILITY OF REAL ESTATE FOR THE PAYMENT OF LEGACIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 384-386, paras. 713-717, and FOR CASES, see DIGEST, Vol. 23, pp. 496-498, Nos. 5621-5640.]

Cases referred to :—

- (1) *Gaskin v. Rogers* (1866), L.R. 2 Eq. 284 ; 44 Digest 585, 4074.
- (2) *Allan v. Gott* (1872), 7 Ch. App. 439 ; 23 Digest 482, 5500.
- (3) *Re Boards, Knight v. Knight*, [1895] 1 Ch. 499 ; 23 Digest 510, 5758.
- (4) *Cunningham v. Foot* (1878), 3 App. Cas. 974 ; 43 Digest 577, 259.

ADJOURNED SUMMONS, arising out of the administration of the estate of George Hobson Thompson, and raising the question whether the Administration of Estates Act, 1925, s. 34 (3), Sched. I, Part II, has the effect of altering the old rule that personal estate is the primary fund for the payment of legacies, with the result that legacies and annuities are thrown rateably on the real and personal estate in proportion to their amounts. The result would affect the amount of estate duty thrown on legacies and annuities, because in so far as they were payable out of realty they would have to pay estate duty.

The testator by his will bequeathed to Emma Wilson Husband an annuity of £300, and empowered his trustee to appropriate and set aside a sufficient part of his estate as a fund for answering by the annual income thereof the said annuity, and declared that, as and when the annuity should cease, the appropriated fund should sink into and form

part of his residuary estate. He then gave, devised, and bequeathed a number of pecuniary legacies and devised and bequeathed the residue of his real and personal estate as to one-third to the Cottage Hospital, Buxton, and as to two-thirds to the Royal Devonshire Hospital, Buxton. By his codicil, as far as relevant, he gave a further pecuniary legacy and declared that that legacy and the legacies bequeathed in his will were to be paid free of legacy duty, and on that a preliminary point arose as to whether the annuity was also to be paid free of duty.

Hon. Charles Russell, for the first defendant, the annuitant. I rely on *Gaskin v. Rogers* (1), which states that an annuity is a legacy.

P. M. Walters for the second defendant, a pecuniary legatee: There is no presumption either way. It is a question of the context of the will. See *Cunningham v. Foot* (4) at p. 989. Here, as the testator uses the word legacies to refer to the residuary bequests to the two hospitals. If he used the word legacy in the codicil to include everything, he would have meant that the hospitals were to take free of duty, although they were residuary bequests. That is sufficient to say that he did not intend to include annuity when he said legacy.

CLAUSON, J.: In my view the legacy given to Miss Emma Wilson Husband is given "free of legacy duty," which are the words used in the codicil. On giving this annuity and a number of other legacies the testator gave residue in a certain way to two charities and used this phrase "both these legacies." He regarded the residuary legatees as receiving legacies. It is suggested that that in some way affects the construction to be placed on the term legacy in the codicil. I confess that that argument does not appeal to me. The law as to the meaning of the word legacy is perfectly clear, and is laid down in *Gaskin v. Rogers* (1), and, so far as I know, has not been questioned. When you find the word legacy used you must construe it in connection with the will, and unless there is something apparent on the face of the will to say that the testator has not used the word in its ordinary legal signification, it will include annuitants. In *Gaskin v. Rogers* (1) SIR W. PAGE WOOD, V.-C., said at p. 291:

The expression "pecuniary legatees" in itself, I do not think, would go further than this—it would exclude specific legatees, that is, legatees of mere chattels, but it would have no effect in excluding, *prima facie*, annuitants from taking the same benefit as they would have taken if the word had been "legatees" instead of "pecuniary legatees." All these rules of construction are open to the general and cardinal principle of considering what you can collect from the testator's whole will, as to words which themselves are not of such clear and definite import as certain other words which have their established and fixed meaning in law.

Prima facie, in this case, the testator is freeing from legacy duty all those who obtain pecuniary benefits under his will. He may have thought that in some way the words he used would free the residuary legatees. I do not know whether he thought that or not, but it appears

to me to be reasonably clear that there is nothing to counter the *prima facie* construction that, by the direction for legacies to be paid free from duty, he means to free from legacy duty those who obtain benefits under his will. I therefore hold that the annuity is free of legacy duty.

The main point in the case was then argued.

F. C. Watmough, for the plaintiff, stated the facts and the question to be decided.

Hon. Charles Russell: As there is not sufficient personalty to pay the annuity, it must be partly paid out of realty and must pay its own part of the estate duty. But the whole of the personalty must be first exhausted, in payment of the legacies and in provision for the annuity, before the realty is resorted to at all, with the result that a smaller part of estate duty will have to be paid by the annuitant and legatees. Although *Allan v. Gott* (2) shows that it is not necessary that there should be an absolute direction in the will in order that a mixed fund should be created, yet a mere direction that legacies are to be paid out of the testator's estate, or his real and personal estate is not sufficient evidence of intention to create a mixed fund, nor has the Administration of Estates Act, 1925, in such a case as this, created for the testator a mixed fund of realty and personalty out of which legacies and other liabilities are to be borne. See also the phrase in *Allan v. Gott* (1) as to the necessity not only of having an expression of operation of the real estate, but also of exoneration of the personal estate, either wholly or partially, before there could be any interference with the ordinary rule for the application of assets. The Administration of Estates Act, 1925, s. 53 (3), is also very relevant to this case, since, in keeping with the intention shown throughout the Property Acts of not interfering with the incidence of death duties, it says "Nothing in this Act shall (c) alter the incidence of any death duties." It would not be right, on the very general words used in Sched. 1 Part II of the Act, to say that the statute has had the effect of altering the entire course of administration and incidence of burdens in a case where a testator has not himself created a mixed fund.

P. M. Walters: I am in the same interest as *Russell*. Sect. 34 (3) is concerned with the discharge of funeral, testamentary and administration expenses, debts and liabilities, which are to be payable in the order mentioned in Sched. 1 Part II, and the question is whether the Act, by throwing real and personal property into a common pot for that purpose and that purpose only, meant to alter the incidence of legacies with regard to real and personal estate. I rely on *Re Boards, Knight v. Knight* (3), which states the law as it was before the Act came into force and is exactly this case. There is nothing in the Act from which you can spell out an intention to make the revolutionary change which is suggested.

W. S. Norwood, for the Royal Devon Hospital, Buxton: The Administration of Estates Act, 1925, s. 41 (1), gives power to appropriate real property in satisfaction of legacies and that is a new power. The Administration of Estates Act has altered the nature of the legatee's interest, and has made legacies payable out of realty and personalty alike.

C. R. R. Romer, for the Cottage Hospital, Buxton: The reason for giving realty an advantage over personalty does not exist now. A court of equity will not go on applying a principle after the reason for it has gone.

CLAUSON, J.: The testator in this case appointed executors, and gave certain legacies and an annuity. Having given these legacies and that annuity, he proceeded in these terms:

I devise and bequeath all my real and personal estate not hereby otherwise devised or bequeathed as to one-third thereof to the Cottage Hospital Buxton, and as to two-thirds thereof to the Devonshire Hospital Buxton, both of these legacies to be known as the Hobson Thompson legacies.

He left behind him personal estate and real estate. The personal estate is sufficient to pay a substantial amount on account of the legacies, but is not sufficient to discharge the legacies, in which I include the annuity, which for this purpose is a legacy, in full. The law which operates under these circumstances is well settled, and I will take a statement of it from the headnote in *Re Boards, Knight v. Knight* (3):

When a testator bequeaths legacies and then bequeaths the residue of his real and personal estate, the legacies are charged upon the real estate or its proceeds, but they are payable primarily out of the personalty, unless the testator directs that they are to be paid out of the mixed fund, in which case they are payable rateably out of realty and personalty.

So it follows that the strict way to administer these assets is to apply the personal estate in paying legacies so far as it will go, and in so far as there is left something payable in respect of the legacies, that will be charged on the realty. The materiality of the matter is this, that in so far as legacies are made payable out of realty certain estate duties in respect of the realty have to be borne by so much of the proceeds of sale of the realty as is applied and appropriated for the legacies or annuity. That is the materiality of the matter. As far as regards the beneficial interests the matter is of no practical importance.

It is suggested that, having regard to certain provisions, to which I will draw attention in a moment, of the Administration of Estates Act, 1925, the rule stated in *Re Boards* (3) is no longer law. It is suggested that by that Act a vast alteration has been made, which results in the law now being, so it is suggested, that, if a testator bequeaths legacies and then bequeaths the residue of his real and personal estate,

the legacies are charged on the real estate or its proceeds and are not payable primarily out of personalty, but are payable out of personalty and realty *pro rata*, according to the proportions of personalty and realty. The suggestion that that is now the law is founded on this, that by the Administration of Estates Act, 1925, s. 34 (3), it is provided that where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions thereafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout, in the order mentioned in Sched 1, Part II to the Act: and Part II provides this. It provides in the first clause for the case of the deceased having died intestate or leaving property undisposed of by will. But it is the second clause with which I have to deal and I propose to make no further reference to the first clause. The schedule is headed "Order of application of assets where the estate is solvent," and Part II, clause 2, is in these terms:

Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

That means so far as not provided for by part of the estate in respect of which the testator died intestate.

It is suggested that the effect of that provision is to alter the law and to provide that the fund which is to be retained out of the residuary realty and personalty in order to meet pecuniary legacies is to be retained in this way, that a proportionate part is to be retained out of realty and personalty *pro rata* the amount of the realty and personalty respectively. The provision does not say that. And the provision is not concerned with any such matter. The provision is concerned with the way in which funeral, testamentary and administration expenses, debts and liabilities are to be met. There is no indication there that there is any intention to alter the law in regard to the rights of legatees as against those interested in the residuary real estate, and I can see no foundation for the suggestion that that provision has in any way altered the law as laid down in *Re Boards* (3). It was suggested to me that a contrary view had been taken, if not in any decided case, by textbook writers. I have had the advantage of having my attention drawn to the statements in the text-books, and I think it is only fair to the text-book writers to say that I cannot find anything in the text-books to which it is legitimate for me to refer, which suggests that the law has been altered in the manner of which I have spoken. It is true that my attention has been drawn to a statement in a book which cannot be treated as a text-book carrying any authority, as it is not edited by a member of the

Bar, in which unquestionably there is a statement to that effect. But though I thought it only fair to look at the book in which that statement is made, I was not able to find on what it was founded, and counsel has not been able to suggest on what it was founded. I see no reason to believe that the law is different since the Act than it was before.

There was another point which was developed and to which it is only right I should refer. The real materiality of the matter is as to incidence of death duties, and Sched. 1, Part II, clause 8 of the Act says this :

(b) This part of this schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

And provisions are to be found elsewhere in the Administration of Estates Act, 1925, which indicate that the position as regards duties is, notwithstanding the Act, to be preserved as it was before. I should have thought the effect of that would be this. That if I had been able to hold that this Act and this schedule altered the law as laid down in *Re Boards* (3), for the purpose of ascertaining the incidence of death duties, the estate would have to be notionally administered as if the Act had not passed. However, that point does not arise if by the Act there is no alteration in the law as laid down in *Re Boards* (3) and all that remains for me is to see what exact question is asked and what declaration I should make. The declaration will be :

(1) That the legacy duty payable in respect of the annuity bequeathed to the defendant Emma Wilson Husband is payable out of the residuary estate of the testator.

(2) That any succession duty payable in respect of any part of the pecuniary legacies and the said annuity falls on the pecuniary legatees and annuitant respectively.

(3) That the said pecuniary legacies and annuity are payable and to be provided for primarily out of the personal estate and as to any balance out of the real estate or the proceeds thereof and that for the purposes of determining what part of the said legacies and the said annuity are to be paid or provided out of real estate the personal estate ought to be appropriated so far as the same extends (without any deduction for debts or funeral or testamentary or administration expenses) to such legacies and annuity and the legacy duty thereon and that any balance required to provide in full for the said legacies ought to be appropriated out of the proceeds of the real estate.

But this declaration is without prejudice to the right of the personal representatives to have recourse (if necessary) to the fund so appropriated for payment of the funeral and testamentary and administration expenses (including the costs to be taxed under this order) and debts if and so far as the balance of the real estate may not be sufficient to provide for the same.

Such proportion of the said legacies and annuity as is payable out of real estate or the proceeds thereof must bear its due proportion of the estate duty attributable to the real estate.

Solicitors: *Donald McMillan & Mott* (for the plaintiff); *Charles Russell & Co.* (for the first defendant); *J. J. Warden Gowing* (for the second defendant); *Cree & Son*, agents for *Sydney Taylor*, Buxton (for the third defendant); *Corbin, Greener & Cook* (for the fourth defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

MORGAN v. CULLEN AND ANOTHER.

[COURT OF APPEAL (Sir Boyd Merriman, P., Scott, L.J., and Eve, J.),
May 5, 6, 1936.]

County Courts—Practice—Reference of whole action by judge to registrar for inquiry and report—Parties not consenting—County Courts Act, 1919 (c. 73), s. 6—County Courts (Amendment) Act, 1934 (c. 17), s. 20.

The county court judge referred two actions by word of mouth to the registrar for inquiry and report. The parties had not consented and the actions did not come within the County Courts (Amendment) Act, 1934, s. 20. The registrar reported and at the hearing before the judge counsel did not question the regularity of the proceedings. The judge found for the defendants, following the registrar's report, and the plaintiff appealed:—

HELD: the proceedings were held *coram non iudice* and were therefore a nullity, and not an irregularity such as the subsequent conduct of the parties could waive.

[**EDITORIAL NOTE.** County court judges are by the County Courts Act, 1919, s. 6, and by the County Courts (Amendment) Act, 1934, s. 20, given certain powers to refer actions as a whole to the registrar for enquiry and report. In cases not within the 1934 Act, s. 20, the consent of the parties is necessary, and this must be an express consent and cannot be inferred from want of objection.

FOR THE SECTIONS OF THE COUNTY COURT ACTS REFERRED TO, see YEARLY COUNTY COURT PRACTICE, 1936, pp. 206, 234.]

Case referred to:—

(1) *Fry v. Moore* (1889), 23 Q.B.D. 395; 16 Digest 124, 224.

APPEAL from two judgments given by His Honour JUDGE SPENCER HOGG at the Lambeth County Court on Mar. 31, 1936, in favour of the defendants (the respondents).

Plaintiff, the appellant, brought two actions against the two defendants, a husband and wife, for possession of certain premises with mesne profits or alternatively for a sum in respect of their use and occupation; and a claim for milk sold and delivered. The subject-matter is not material to the appeal, which turned on the jurisdiction of the learned

judge to refer the whole of both actions to the registrar for enquiry and report. The actions did not fall within the provisions of the County Courts (Amendment) Act, 1934, s. 20. The reference was apparently not made in writing and when the parties appeared before the registrar there was doubt concerning its terms. The registrar went to enquire of the judge and returned saying that the whole of the two actions were referred to him for inquiry and report. Neither party consented to the reference at any time, but neither objected to the hearing by the registrar, who duly presented to the learned judge a report in accordance with which the learned judge gave judgment. The parties were agreed that there was no contract, as they were never *ad idem*.

H. V. Lloyd-Jones for the appellant.

B. M. Cloutman and *Henry Westlake* for the respondents.

Cloutman, called on to justify the procedure in the county court: 'The judge could properly have referred the whole of both actions with the consent of both parties, but actually referred it without their consent. When the report was presented, counsel for the appellant plaintiff did not object but argued upon the matter of the report. This constituted a waiver of the irregularity, which could at any time have been cured by consent. The machinery of the county court is not capable of dealing with actions which require several days to try.

Lloyd-Jones was not called upon.

SIR BOYD MERRIMAN, P.: This appeal raises a question of considerable public importance. As we are not able to approve of the way in which the matter has so far been conducted, it is necessary to state as briefly as possible what were the issues in the case and how, so far, they have been dealt with. Two actions were started on different dates by the same plaintiff against the same two defendants in the county court, and eventually, after abortive attempts at settlement at the instance of the county court judge, the two actions came on together. They were: (1) A claim for possession of certain premises with the usual claim for mesne profits and an alternative claim for a sum in respect of use and occupation; and (2) a claim for goods sold and delivered. The substance of the matter underlying both these actions was this: The defendants—or at any rate one of them—had intended to enter into an agreement with the plaintiff the details of which are highly controversial and still remain in issue, for the occupation of these premises as incidental to some form of business arrangement between them in respect of what I will call shortly a milk business. In fact—and this is the one thing that is common ground in this case—the parties were never *ad idem* as to the agreement by virtue of which this possession was taken of the premises. Two attempts having been made to bring the parties together, the learned county court judge referred the matter to the registrar for inquiry and report.

I shall have to examine for one moment the statutory power to make any such order, but I wish to say this by way of preface. When the matter came before the registrar of the county court, counsel for the defendants, who were then both represented by one counsel, presented to the registrar an endorsement of what he conceived to have been the county court judge's order: "No *consensus ad idem*; referred to the learned registrar for inquiry and report on the footing that there was no agreement." Counsel for the plaintiff, Mr. Dill Smith—though it was admitted that he had never consented to any order for reference at all—was obliged to point out that the endorsement did not represent his view of what the learned judge had ordered. He said that according to his record the judge had not limited the reference in this way, nor had he yet made any finding as to whether there was or was not a contract. Thereupon inquiries were made by the registrar, who was about to enter upon this enquiry and report, as to what it was the learned judge wanted him to do. Having made these inquiries, the parties not being present, he came back and said in effect that Mr. Dill Smith was right and the learned judge had intended to refer the whole action to him for inquiry and report; and the matter proceeded on that footing.

It is in my view imperative that when, under the statutory powers to which I am about to refer, the county court judge delegates part of the trial of the action to the registrar, the exact scope of that matter which is referred to the registrar should be defined in an order regularly drawn up, so that the parties may know precisely where they are. Mr. Cloutman has quite truly pointed out that at this stage it would have been possible for the plaintiff in the action to appeal against the form of reference, but it is manifest that the parties are in great difficulty in exercising their rights of appeal and, speaking generally, in defining their position unless an order of this character is drawn up in regular and precise terms. Ord. 20A directs that the order for a reference for inquiry and report shall be in a particular form, which is set out in the appendix.

It is important next to see what are the statutory provisions under which this order purported to have been made—assuming that we must treat the order spelt out in the way I have described as being an order to refer for inquiry and report the whole action without the consent of the parties. As the whole of the consolidating County Courts Act, 1934, is not yet in force, we have to look at the two sections which are in substance collected in sect. 90 of that Act, namely, the County Courts Act, 1919, s. 6, and the County Courts (Amendment) Act, 1934, s. 20. The material words of sect. 6 of the 1919 Act are these:

Subject to county court rules, the judge may in any case, with the consent

of the parties, refer any action or matter or any question arising therein to the registrar or a referee for inquiry and report.

The material words for the present purpose are: "The judge may . . . with the consent of the parties, refer any action . . . to the registrar." Under the County Courts (Amendment) Act, 1934, s. 20, it is provided :

Notwithstanding anything in sect. 6 of the County Courts Act, 1919, the judge shall have power, whether with or without the consent of the parties, to refer in accordance with the provisions of that section—(a) any action or matter which requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the judge, conveniently be made before him; (b) any action or matter where the question in dispute consists wholly or in part of matters of account; (c) subject to any right to have particular cases tried with a jury, any question arising in any action or matter.

It is agreed that, in regard to the reconstruction of the judge's order to which I have referred, this was not a mere reference of a question arising in an action or matter, but was a reference of the very action itself. It follows from the reading of these two sections that, though there is a power to refer the whole of an action of a certain class, of which this particular action was not one, without the consent of the parties, there is, apart from that provision, no power to refer the whole action for inquiry and report without their consent. It is conceded that there was no consent to the judge's order, and the question therefore is—to use a phrase quoted from the judgment of LORD LINDLEY from *Fry v. Moore* (1)—"Whether the order was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity." The Lord Justice, as he then was, said in that case that he was not going to attempt to draw an exact line between irregularity and a nullity, but further added that it was generally easy to see on which side of the line a particular case would fall. I have no difficulty in this case in seeing on which side of the line this particular order falls. Mr. Cloutman, though he has very properly not attempted to press the argument beyond a certain point, puts forward the suggestion that this matter could be dealt with as an irregularity, because the sort of thing that was done by order here could be done by consent of the parties. He therefore said, or suggested, that it was a mere irregularity which subsequent conduct of the parties could be held to have waived. I do not think that argument is sound, for this reason. The parties themselves, who know the facts and circumstances, are no doubt the best judges of whether, in the circumstances of a particular case, it is a useful and proper thing to refer the whole action for enquiry and report to the registrar and then leave the ultimate decision to the judge. If they are both of that opinion, they cannot complain if an order is made in that sense. And, of course, as everybody who has practised in the county court knows, this section was designed to relieve pressure in the county court by enabling parties,

when they were so minded and were both of the same mind, to get not merely questions but in effect the whole action decided by the registrar, subject to the right and power of the judge to give the final decision in the matter without being limited, as he was under the old statutes, to the necessity of treating the registrar as a consensual referee with all the consequences which flow therefrom. But though the legislature has made that provision for the case where the parties consent to the course, it seems to me to be perfectly plain that the legislature had no intention of enabling, and in fact intended expressly to prohibit, any such course being taken against the will of the parties except in the special class of cases where matters of prolonged examination of documents, scientific and local investigation, and account make it proper that such an order should be made notwithstanding the failure of the parties to consent.

In my opinion it is vital that this distinction should be kept clearly in mind, for this reason—and this case is a very good illustration of it. If the learned judge, without the consent of the parties, could refer any action to the registrar for inquiry and report, what would in effect be done would be this : he would direct another person to hear the witnesses and observe their demeanour and report to him upon the impression made by those witnesses, and would then himself draw the conclusions of fact which depend upon a correct decision as to the weight of evidence. That seems to me to be a proposition which has only to be stated to be rejected as absurd. It cannot be that the legislature meant that an action could be tried in that way. Yet it is that, or something like that, which has been done in this case. I do not wish to use any language beyond the necessity of the matter, but I am bound to say that this case shows how necessary it is to stick to the statutory jurisdiction. What has happened is that, after a four days' hearing before the registrar, a report has been produced to the learned judge which is very careful and very elaborate but, I am bound to say, bears very little relation to the dispute between the parties. When this matter goes back, as it must go back, to the county court judge, it is with the direction that the county court judge—than whom there is no one better fitted—shall himself determine the issues in this matter, limited as they now are by the agreement that one issue, at any rate, no longer exists : the issue as to whether or not the parties were *ad idem*. The case must go back with no comment from us as to any impression we may or may not have formed as to the reality of the remaining issues, with leave to the parties to amend their pleadings if necessary, so as to bring clearly before the county court judge such matters as, after the unfortunately prolonged enquiries which have already taken place, still remain in issue between them. The appeal must be allowed and the matter remitted to the county court judge for trial.

SCOTT, L.J. : I should have added nothing but for the general importance of the case. The learned judge in fact referred the whole of two actions to the learned registrar of the court without the consent of the parties required by the County Courts Act, 1919, s. 6 (1), which is the only provision authorising any such course. I agree with my Lord that by the County Courts (Amendment) Act, 1934, s. 20, the learned judge had no jurisdiction to refer the whole action as he did. The result is that everything done was a nullity, including the long report of the registrar and the subsequent hearing before the judge. There has been no hearing of the case, and it must now be heard and tried out. It ought to be tried by the judge with a completely fresh mind, and the previous proceedings, which all took place *coram non judice*, ought not to be referred to at all. The evidence was not evidence, as it was not *coram judice*. Apart from the consent of the parties, the responsibility of judicial decision resting on county court judges under the County Courts Acts ought to be discharged normally by the judge himself and not delegated unless in the special circumstances of the case there is ground for a particular reference really within the spirit of the sections which, now or hereafter when the Act of 1934 comes into full effect, authorise the delegation of his judicial duties.

EVE, J. : I agree with all that has been said. The appeal affects or involves the question of whether two orders made on Mar. 31 last in favour of the respective defendants to these proceedings can stand, or whether, as the plaintiffs allege, they were made without jurisdiction and in circumstances which require the interference of this court to prohibit any further acting therein. In my view, agreeing with my learned brethren, I am of opinion that the two orders should be set aside and the appeal allowed, and that the parties should have an opportunity of reconsidering the attitudes which they respectively adopt, having regard to the matters which have become important and to those which are of no continuing importance in the interval which has expired since the orders were made. For that purpose it is necessary that some amendment be introduced into the pleadings and particulars ; but in sanctioning amendments it must be provided in the order that the scope of these amendments must not extend beyond this : that they must be in respect of matters which have become important, or as I said, unimportant, as the case may be, since the case was disposed of. I venture to suggest that the order which we ought now to make should be that the appeal should be allowed, that the two orders of Mar. 31 should be discharged, and that it should then be open to the parties to make such amendments in their pleadings and particulars as they may be advised to make, regard being had to the changes brought about by the lapse of time since the proceedings were instituted ; and then that the whole matter should be remitted to the learned county court judge

to be heard by him on the amended pleadings and particulars. What is to be done with the costs of the action I leave to the learned President to state.

Appeal allowed. Order made in the following terms :

Appeal allowed. Neither party to have costs, and the costs below to abide the result of the ultimate appeal. Actions to be consolidated. Such amendments to be allowed as may be necessary to raise any points which have arisen since the pleadings were originally filed. Actions to be remitted to the county court judge to hear with pleadings as amended.

Solicitors : *T. D. Jones & Co.* (for the appellant) ; *Ernest A. Mathew* (for the respondents).

[*Reported by* DEREK H. KITCHEN, ESQ., *Barrister-at-Law.*]

HEGINBOTTOM v. WATTS.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), **April 28, 1936.**]

Landlord and Tenant—Rent restriction—Class C dwelling-house—Claim for possession—Decontrol—Onus of proof—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 1 (2).

The defendant was tenant at a rent of 4s. per week of one room in a house owned by the plaintiff. The plaintiff served a week's notice to quit upon the defendant which was not complied with. At the hearing of a summons to recover possession the plaintiff proved the facts of the tenancy and notice to quit and put in a certificate of decontrol obtained in respect of the tenancy by a previous owner. No evidence was tendered of any facts giving rise to the decontrol. The county court judge dismissed the summons, holding that the plaintiff had not discharged the onus that was upon the plaintiff of proving the decontrol of the premises. The plaintiff appealed :—

HELD : in every case the onus is upon a tenant of a dwelling-house to prove that the house is still controlled.

EDITORIAL NOTE. This case deals with the construction of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 1 (2). The same subsection has already been considered in *White v. Bembridge* (1), but that case is distinguishable from the present one. There control depended upon the rateable value on the appointed day, in that case Apr. 6, 1931, whereas in the present case control depended on the other provision of the subsection, the application of the Rent Acts to the dwelling-house immediately before the passing of the Act of 1933. LORD HANWORTH, M.R., in *White v. Bembridge* (1) stated in quite general terms that the effect of sect. 1 (2) was to decontrol a dwelling-house unless the tenant can establish that the case falls within the proviso, and applying his reasoning to the present case the court have resolved any doubts which may have existed as to the onus of proof in respect of what GREENE, L.J., calls the two limbs of the provision and as to the application of the principle to dwelling-houses of all classes. It is now clear that in every case the onus is upon the tenant to show that the house is still controlled.

AS TO DECONTROL UNDER THE ACT OF 1933, see HALSBURY, Hailsham Edn.,

Vol. 20, pp. 317-321, paras. 375-380; and FOR THE CASE, see DIGEST Supp., Landlord and Tenant, p. 69, No. 7092a.]

Case referred to :—

(1) *White v. Bembridge*, [1935] 1 K.B. 244; Digest Supp.

APPEAL from a decision of His Honour JUDGE HIGGINS, given at Willesden County Court on Mar. 4, 1936.

The plaintiff was the owner of a house in which the defendant was the tenant of one room, upon a weekly tenancy at a rent of 4s. per week. The plaintiff served a week's notice to quit upon the defendant. The defendant failed to deliver up possession and the plaintiff thereupon took out a summons in the county court to recover possession. At the hearing the plaintiff proved the facts of the tenancy and of the notice to quit and he put in a certificate of decontrol which had been obtained in respect of the tenancy by a previous owner. No evidence was tendered of any facts giving rise to the decontrol. The county court judge dismissed the summons, holding that the onus was upon the landlord of a class C house to show that it had been decontrolled and that the plaintiff had not made out a *prima facie* case for possession. The plaintiff appealed.

H. Heathcote-Williams and *L. A. Blundell*, for the appellant: The burden of showing that the Rent Restriction Acts apply to a dwelling-house is in every case upon the tenant and the landlord does not have to prove that the house has been decontrolled. *White v. Bembridge* (1) drew no distinction between the classes of dwelling-houses.

The respondent did not appear and was not represented.

GREER, L.J.: Unfortunately, in this case the respondent is not represented, and we have not had the benefit of hearing any argument on his behalf. The contention for the appellant is that the learned judge ought to have made an order for possession, because the tenant did not prove what it is contended is for him to prove, namely, that immediately before the Act of 1933 this was a controlled house, and also that he did not prove what its rateable value was, or what its rent had been; and although I have hesitated in thinking that the legislature intended to put the burden on an occupying tenant of premises which were let at 4s. per week of establishing that the premises had never been decontrolled by reason of some previous landlord going into actual possession, or for some other reason, still, I think we must treat the decision in *White v. Bembridge* (1) as based upon the reasons given by LORD HANWORTH, M.R., in his judgment, and, so treating it, I think we are bound to say that in this case the tenant did not comply with the burden of proof which is put upon him by the Act of 1933 as interpreted by the Court of Appeal in *White v. Bembridge* (1). Therefore, this appeal should be allowed.

GREENE, L.J. : I agree. I do not think it would be possible to decide this case otherwise without departing from the principle laid down in the case of *White v. Bembridge* (1). In that case LORD HANWORTH, M.R., at page 247, states the principle with regard to the effect of sect. 1 (2) of the Act of 1933 in quite general terms. What he says is this :

It is plain that the opening words of the subsection, namely, that the principal Acts shall not apply, are an over-riding statement of the law, and restore the relationship of landlord and tenant to the contract made between them unless the tenant can establish that the case falls within the proviso.

Now it is perfectly true that in that case the particular limb of the provision in question with which the court was concerned was the limb referring to rateable value, and in that case the tenant failed to discharge the burden of proof which was upon him in regard to that particular matter ; but the language of the Master of the Rolls as I read it, draws no distinction between that limb, which deals with rateable value and rent, and the other limb, which deals with the application of the Act to the dwelling-house immediately before the passing of the Act of 1933—and he states it quite generally that the burden of proof is on the tenant to establish that the case falls within the proviso, and by that I think he means that unless the tenant can establish all the circumstances laid down in the subsection as necessary to make the Act apply, that the landlord is entitled to succeed. The effect of reading the subsection is (if one can put it into subheads in this way) that as from Sept. 29, 1933, the principal Acts shall not apply to any dwelling-house unless (a) it is a dwelling-house to which they applied immediately before the passing of this Act, and (b) that it is also a dwelling-house of which either the rent or the rate does not exceed so much. If the subsection be dealt with in that way it would not be possible, I think, consistently with logic, to say that the burden of proof under the head I have called (b) should be on the tenant, and that the burden of proof under the head I have called (a) should be on the landlord. In my opinion the authority of *White v. Bembridge* (1) covers this case, and the appeal is entitled to succeed.

TALBOT, J. : I agree, and have nothing to add.

Solicitors : *Seaton & Co.* (for the appellant).

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

R. v. SALFORD ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), May 6, 1936.]

Rates—Assessment committee—Clerk—Appointment of officer of county borough council—Rating and Valuation Act, 1925 (c. 90), s. 55.

The respondent committee resolved to appoint as clerk a gentleman who was an officer in the Town Clerk's department of the City of Salford, the corporation being the rating authority :—

HELD : such officer was not disqualified, either by statute or by common law, from acting as clerk to the assessment committee.

[EDITORIAL NOTE.] The point here is the short one whether an officer of the local authority, which is also the rating authority, can be clerk of the assessment committee, and the court has found that there is no disqualification either by statute or at common law.

THE PRESENT LAW RELATING TO THE APPOINTMENT OF THE CLERK OF THE ASSESSMENT COMMITTEE is in RATING AND VALUATION ACT, 1925, s. 55, which is given in HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, p.678.]

Cases referred to :—

- (1) *R. v. North Worcestershire Assessment Committee, Ex p. Hadley*, [1929] 2 K.B. 397 ; Digest Supp.
- (2) *R. v. Surrey Assessment Committee, N.-E. Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd.*, [1933] 1 K.B. 776 ; Digest Supp.

APPLICATION to make absolute a rule *nisi* for prohibition from acting on a resolution.

The Salford Assessment Committee passed a resolution to appoint as their acting clerk an officer in the Town Clerk's department of the Salford Corporation. This corporation was the rating authority. A rule *nisi* was obtained on the ground that such officer was disqualified both by statute and by common law from so acting.

Erskine Simes appeared to show cause against the rule : There is no disqualification by statute (Rating and Valuation Act, 1925, Sched 1, r. 12, and the Local Government Act, 1894, s. 46). The proposed acting clerk is not one of the persons named therein. There can be no suspicion of bias when in fact the body of which he is to be a servant consists, to the extent of two-thirds of its membership, of members of the rating authority. He quoted the Local Government Act, 1929, s. 15, altering the Rating and Valuation Act, 1925, s. 17 (3).

Michael Rowe, in support of the rule : The assessment committee is in a quasi-judicial capacity and must take care that none of its officers or servants is tainted with bias.

LORD HEWART, L.C.J. : In my opinion this rule ought to be discharged. It is sought that a writ of prohibition may be issued to prohibit the assessment committee of the City of Salford from acting upon a certain resolution named in this rule. The point of substance is that

it is complained that a gentleman has been appointed by the Salford Assessment Committee to be acting clerk of that committee, notwithstanding the fact that he is an officer employed in the Town Clerk's department of the City Council. The argument is based upon two grounds. It is said first that, holding the position he does, this gentleman comes within statutory prohibition. Secondly, it is said that, however that may be, he is likely to give rise to a suspicion of bias if he occupies this twofold appointment.

Our attention has been directed to the relevant sections of the statutes dealing with the powers of assessment committees and their composition, and to the reported cases which are thought to throw some light upon the present matter. It is not necessary to refer to them in detail. One thing is obvious : although there are certain specific prohibitions naming persons who are not to be able to perform certain acts, this gentleman *ex concessis*, and as is obvious, is not named in any of those prohibitions, and the fact that others are named and he is not is a fact of no little importance. If it had been intended to exclude a gentleman in this position a very few words would have accomplished that purpose. He is not by statute prohibited, but it is said that his appointment and his acting in this twofold way may reasonably create a suspicion of bias and that, therefore, the appointment ought to be prohibited in accordance with the well-known maxim that it is not only necessary that justice should be done, but that it should manifestly appear to be done. But when I look at the scheme of this legislation, the very wide powers deliberately given to assessment committees and the peculiarity of their composition, I cannot think that the fact that this gentleman is employed in the department of the Town Clerk can, in the mind of any reasonable man, give rise to any real suspicion. Two-thirds of the members of the assessment committee are themselves members of the rating authority, and they have at all times a sufficient and satisfactory working majority. The gentleman referred to, by reason of the fact that he is employed in the department of the Town Clerk, is a servant of the body of which two-thirds of the members of the assessment committee are themselves members, and it seems to me somewhat idle in these circumstances to speak of his giving rise to a suspicion of bias, because his services are added to the services of two-thirds of the members of the body itself.

Now Parliament itself has, and one must assume deliberately, given the assessment committee very wide powers, a very wide discretion in the appointment of officers. The Rating and Valuation Act, 1925, s. 55 (1), provides as follows :

It shall be lawful for rating authorities, assessment committees, and county valuation committees to appoint for the purposes of this Act such rating officers, valuation officers and other officers as they think fit, and to pay to any officers so appointed such reasonable salaries as they think fit.

There is no need to have recourse to the familiar illustration about swallowing a camel and straining at a gnat, but I cannot think, in view of the extent of the powers given to a committee of this kind, that it would be right to prohibit this committee from acting upon its resolution, whereby this officer is acting as clerk to the committee, notwithstanding the fact that he is a person employed in the Town Clerk's department. As Mr. Simes has very usefully pointed out, if we were dealing with London instead of Salford, the Town Clerk himself not only might be, but must be, the officer performing duties of this kind. I think, therefore, that this rule ought to be discharged.

DU PARCQ, J. : I agree. Parliament, when constituting this body, the assessment committee, upon which members of the rating authority may be—and probably usually are—in a very large majority, has been careful to state expressly in what cases persons are not to be permitted to be present during the deliberations of the assessment committee, and there is nothing in that statement to exclude a person in the position of the gentleman concerned in this case. That makes it difficult to say that he ought to be excluded on the ground of what is called, for the sake of brevity, a common law disqualification. There is one point in this case upon which stress was properly laid by Mr. Rowe—and, indeed, our attention was called to it by Mr. Simes ; and it does no doubt call for consideration. This gentleman very frankly says in his affidavit that as part of the duties of a committee clerk he has attended meetings of the rating committee for the purpose of taking minutes of their proceedings. He adds, however, that he does nothing more than record the proceedings and is in no way concerned with their decisions, and takes no part, either advisory or otherwise, therein. I do not think that the fact that he does attend those meetings makes any difference. It is not disputed that every member of the rating authority who is also a member of the assessment committee, although he may not be permitted to be a member of the rating committee, still has access to the minutes of the rating committee and knows what is going on at the rating committee meetings, and I do not think that any reasonable person would suspect this officer of bias merely on the ground that he attends on occasions to record what takes place at the meetings of the rating committee. For these reasons, as well as for the reasons given by my Lord, I agree that this rule should be discharged.

GODDARD, J. : I agree. For myself I should be content to base my judgment solely upon the wording of sect. 55 (1). There is no room for the application of what has been compendiously called the common law if the statute is wide enough, because the statute can override or alter any doctrine of the common law ; and if Parliament chooses to give, as I think they have by sect. 55 (1), the widest possible discretion to committees as to whom they may appoint as their officers, it follows

that if they do appoint an officer, this court cannot say that he is a wrong person to appoint. Consequently I see no grounds for issuing a prohibition in this case, and I agree with the judgments which have been delivered.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Brett & Co.*, Manchester (for the respondents); *Peacock & Goddard* (for the applicants).

[*Reported by H. P. LANSDALE RUTHVEN, ESQ., Barrister-at-Law.*]

BURMINGHAM v. LINDSELL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), **March 27, 1936.**]

Street Traffic—Sound-recording van—Apparatus an essentially permanent fixture—Goods vehicle—Road Traffic Act, 1930 (c. 43), ss. 2 (4) (b), 10 (1), Sched. I.

The driver of a sound-recording van drove it at more than 30 m.p.h. on a road where the speed of private motor cars was not restricted. The apparatus fitted in the van was an essentially permanent fixture within the Road Traffic Act, 1930, s. 2 (4) (b). The driver was convicted of an offence under sect. 10 (1), the court holding that the car was a goods vehicle within Sched. I, para. 2. The driver appealed, submitting that the car was a private car, as it was taxed as a private car and the apparatus was not a load within sect. 2 (4) (b) :—

HELD : the car was a goods vehicle, for the apparatus was a burden within Sched. I, para. 2.

[**EDITORIAL NOTE.** The point in issue here was whether this sound-recording van was a private car or goods vehicle. It is true that it did not carry goods in the ordinary sense, but it was clearly not a private car. The class of a vehicle in this connection is not decided by the tax payable thereon; and it is, of course, a question of fact for the justices.

FOR THE LAW ON THE POINT, see HALSBURY, Supp. to Vol. 27, *Street Traffic*, paras. 631-635; and FOR THE ROAD TRAFFIC ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 607.]

APPEAL by way of case stated from a decision of justices for the Feltham Division of Middlesex, convicting the appellant of driving a motor car at a speed exceeding 30 miles per hour.

On July 20, 1935, the appellant drove a motor vehicle at a speed of about 40 miles an hour in an unrestricted area. The vehicle was built in the form of a van and belonged to Gaumont British, Ltd., who employed the appellant as a driver. It contained a sound-recording apparatus and a block of batteries which were never removed from the vehicle except for the purpose of being re-charged, and the sound-recording apparatus could not be disconnected from the vehicle.

Laurence Vine, for the appellant : The speed limit does not apply to an ordinary private vehicle in an unrestricted area. The apparatus in

this car was an essentially permanent fixture and therefore the Road Traffic Act, 1930, s. 2 (4) (b) applied. The vehicle was a private car. It appears to be a van, but it is specially constructed for the purpose of being used in connection with sound-recording and is never used for anything else. The class of the vehicle is fixed by the amount of tax payable, in this case £1 per horse power. If it were a goods-carrying vehicle, the amount of the tax would be according to the weight. In an unrestricted area, the vehicle was in the same position as an ordinary private motor vehicle.

F. J. Powell, for the respondent, was not called upon.

LORD HEWART, L.C.J. : There is nothing in this appeal. The justices were right and it is a very proper decision. For the purpose of restricting the speed of certain vehicles the Road Traffic Act, 1930, Sched. I, divides vehicles into three large classes, each of which has its own special divisions. This vehicle was said to be a goods vehicle within that schedule : that is to say, it came within the class of vehicles constructed or adapted to the conveyance of goods or burden of any description. Was not this vehicle carrying a burden of some description ? It obviously was. When one comes to the ascertainment of the *quantum* of the load for other purposes, sect. 2 (4) (b) says that where there is an apparatus essentially of a permanent character, that apparatus is not to be treated as part of the load. But it does not follow that it is not a burden. It manifestly is a burden. The vehicle was constructed to carry not passengers but a burden. That being so, I think the appeal must be dismissed.

DU PARCQ, J. : I agree.

GODDARD, J. : I agree.

Solicitors : *Amery-Parkes & Co.* (for the appellant) ; *Solicitor to the Metropolitan Police* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

QUEEN ANNE'S BOUNTY (GOVERNORS) v. PITT-RIVERS.

[KING'S BENCH DIVISION (Talbot and Atkinson, JJ.), April 6, 1936.]

Ecclesiastical Law—Tithe rentcharge—Application for recovery—No notice of opposition by landowner—Right of landowner to be heard—Tithe Act, 1891 (c. 8), ss. 2 (1), (7), 3 (1)—Tithe Rentcharge Recovery Rules, 1891-1933, rr. 5, 8.

Applications had been made to the county court for the appointment of a receiver for the recovery of certain tithe rentcharge. The landowner gave no notice of opposition to the applications, but he attended the court and claimed a right to be heard under the Tithe Act, 1891, s. 2 (1). The county court judge offered an adjournment to enable the landowner to file his notice of opposition, but this was refused, the landowner maintaining his claim to be heard then and there and saying that the Tithe Rentcharge Recovery Rules, 1891-1933, r. 8, and the other rules which purported to extend the power of the county court under sect. 2 (1) of the Act of 1891, were *ultra vires* the rule committee. The judge withdrew the offer of an adjournment and made an order for the appointment of a receiver. The landowner applied to the High Court for a writ of prohibition to issue to the county court judge, to the receiver and to the titheowner to prohibit them from proceeding further in the matter of the applications. The judge in chambers dismissed the summons and the landowner appealed:—

HELD: the rule committee had power to make the rules and regulations which they had made with regard to the recovery of rentcharge, and the landlord did not have an unregulated right of audience under the Tithe Act, 1891, s. 2 (1).

[EDITORIAL NOTE. The only point of contest here was the validity of the Tithe Rentcharge Recovery Rules, 1891-1933, rr. 5 and 8, which were said in certain circumstances to prevent a party from being heard in the county court. The rules were, however, held to be valid, as they merely regulated the right of audience of a party to the proceedings.

AS TO RECOVERY OF TITHE, see HALSBURY, Hailsham Edn., Vol. 11, pp. 889, 890, para. 1596; and FOR THE CASES, see DIGEST, Vol. 19, pp. 492-494, Nos. 3489-3509.]

Case referred to:—

(1) *R. v. Pawlett* (1873), L.R. 8 Q.B. 491; 33 Digest 393, 1039.

APPEAL from an order of PORTER, J. in Chambers made on Mar. 3, 1936, refusing to allow a writ of prohibition to issue against the County Court Judge of Dorset, who it was alleged had exceeded his jurisdiction in appointing a receiver, under the Tithe Act, 1891, to collect the tithe rentcharge payable out of the lands owned by the appellant, Captain Pitt-Rivers. The application for the appointment of a receiver had been made pursuant to the Tithe Rentcharge Recovery Rules, 1891, r. 8. The appellant gave no notice of opposition to that application but on the day appointed for the hearing appeared before the court in person, and claimed the right to be heard. The judge pointed out to the appellant that under the Tithe Rentcharge Recovery Rules, 1891-1933, r. 5:

A respondent desirous of opposing an application shall, at least seven clear

days before . . . the hearing, file with the registrar of the court notice of his opposition,

and that under rule 8, where no notice of opposition is given, the facts stated in the notice of application shall be deemed to be admitted, and the court may make an order for the recovery of the amount claimed. The judge offered to adjourn the proceedings in order that notice of opposition might be given by the appellant, but that offer was declined, the appellant claiming a right to be heard then and there. The judge thereupon made an order appointing a receiver without hearing the appellant. It was contended on behalf of the appellant that the rules of 1891 were *ultra vires* in so far as they purported to deprive him of his right to be heard, and that the judge had exceeded his jurisdiction in making an order pursuant to an invalid rule. On Jan. 15, 1936, the appellant by leave took out a summons in the High Court for a writ of prohibition to the county court judge, to the receiver, and to the tithe owner to prohibit them from further proceeding in the matter of the applications before the county court judge. On Mar. 3, 1936, PORTER, J. at Chambers, made an order dismissing the summons. The landowner, Captain Pitt-Rivers, appealed.

R. M. Montgomery, K.C., and *Cecil Binney* for the appellant.

P. E. Sandlands, K.C., and *A. H. Armstrong* for the respondents.

TALBOT, J.: This is an appeal from the refusal of PORTER, J., sitting in chambers, to allow a writ of prohibition, or a writ in the nature of prohibition, to issue to the learned county court judge in Dorset. The learned county court judge had made an order under the Tithe Act, 1891, s. 2, for the appointment of a receiver, which, as we all know, is the authorised way, and, indeed, the only authorised way, I think I am right in saying, in which tithe rentcharge can be recovered if it is unpaid. The learned judge had before him three applications all against the same gentleman, who is the appellant here, and had in fact appointed a receiver, and the prohibition, or order in the nature of prohibition, is asked for against the judge and against the receiver. Whether, in any circumstances, an order of that nature against the receiver is correct, I express no opinion.

The circumstances in which this matter arose were these. The appellant had not given any notice of opposition to the applications in the county court, but he nevertheless attended the county court and claimed then, as he claims now, that he had the right to be heard, and after a good deal of discussion of one kind and another he says—and up to a point, at any rate, it is true—that the learned judge refused to hear him and ultimately he was not heard. He did not, so far as I can gather from the note of the evidence of the proceedings, to which we have been referred, and which is verified by affidavit, specify, or, apparently, he did not specify

with any clearness, the precise point or points upon which he desired to be heard. He is not a lawyer, as far as I know, and I do not think it is suggested that he put the matter exactly in the way in which his learned counsel has argued it before us. But, in substance, he relied, I think, upon the same contentions, that is, the section of the Tithe Act which contains the words "after hearing such owner"—that is the owner of the lands out of which the rentcharge was claimed—"if he appears and desires to be heard," and that that is a condition on which the court may order that the said sum or such part thereof as may be due be recovered in the manner provided by the Act and the rentcharge cannot be recovered in any other way. He says, first of all, that he did appear, and that "appear" has only its ordinary English meaning and does not mean appear by a certain form of document, or in any other precise way. He says he did appear in the flesh, so to speak, and he desired to be heard and asked to be heard. Then he was confronted, when he put that point and made that contention, by the rules, rules made under this statute itself. As a matter of fact, I dare say there are more, but there are at least two editions or enactments of rules under the rule-making power conferred by the Act. It was quite proper that we should be told that, and we were referred to certain differences which there were in the succeeding editions. But I do not think there is any dispute as to what rules are now in force. He says that, so far as they qualify and abridge the general right which the statute confers, or, rather, perhaps I ought to say the general limitation of the powers of the judge which the statute imposes, namely, that they are only to be exercised after hearing the owner if he appears and desires to be heard, they are beyond the power of the rule-making committee.

Now in order to see what those powers are, we have to look at the Act. The first relevant enactment is sect. 2 (7). "Rules under this Act may regulate the procedure practice and costs under this Act in county courts"—then there are some special directions—"and may direct what service shall be good service for the purposes of this Act," and may provide that if the owner is unknown certain procedure can be used. Then by the following sect. 3 (1):

The Lord Chancellor may, after consultation with the rule committee of county court judges, make rules for carrying this Act into effect, and for regulating, providing, and prescribing any matter authorised by this Act to be regulated, provided, or prescribed by rules under this Act.

That is all I think I need read of that. It obviously is directed to the same point, among others, perhaps, as sect. 2 (7) which uses the words "may regulate the procedure practice and costs under this Act in county courts." It is said, and it is, I think, really the whole of the argument for the appellant here, that that abridges the unambiguous and general sweeping condition which is imposed by sect. 2 (1)—the court must hear

the owner, that is the owner of the lands, if he appears and desires to be heard, and it is only if the court has done that that they may make the order which is essential to recover the rentcharge. I think, on the face of it, one only needs to read that and to read the purposes for which the rules under the Act are authorised, to see that that is a very narrow and perhaps it might not unfairly be said pedantic mode of construing sect. 2 (1). It is said, on the other side, that it is a wholly unreasonable way of construing it: the fair meaning of these sections taken together is this: the owner must appear and he must express a wish to be heard, but, subject to that, the procedure as to that matter and as to any proceeding before the county court, may be regulated by the body which is empowered to make rules under the Act.

The whole case turns, I think, ultimately on how you view that legislation. I think the argument for the appellant covered a very considerable range, because if I followed the argument correctly, it involved the contention that five or six of these rules went beyond the powers of those who made them. It is perhaps not immaterial besides calling attention to the importance of the persons who were charged with the duty of making these rules, or the power of making the rules, at any rate, to notice how they are described by the authors of them. I observe that the heading of this branch of the rules is, "Procedure on application for recovery of tithe rentcharge." Of course, that is not conclusive, but we are confronted with the fact that the Lord Chancellor, with the advice which is certainly advice to which most people would be disposed to listen on a matter of this kind, considered that the rules which they were issuing for the public and which, if they are within their powers, have the force of statute, were rules which could be correctly described as rules dealing with the procedure on application for the recovery of tithe rentcharge. Unless they are wrong about that, the argument for the appellant here disappears. I do not think it would be serving any useful purpose to enlarge upon the effect which would be reached if we yielded to the argument for the appellant, but it clearly involves cutting a very considerable hole in this code of rules and a hole that, I am bound to say, after hearing the argument, does not appear to me to have been at all in the contemplation of those who framed the Act in 1891 and those who are responsible for the language of the sections which gave to the authority power to make these rules. I think the other is a far more natural and a juster and a more reasonable construction of the Act, and that comes to this, expressing it in popular and general language: that the procedure—the details of the procedure, the kind of things that are dealt with under the innumerable rules which now regulate so many matters under the authority of Parliament—was left to this rule-making authority and that the statute merely provided, no doubt most justly, that the owner, if he wished to be heard,

had to be heard ; but I think it is an unreasonable extension of that, and pressing it beyond its natural meaning to say that that means the rule committee had no power to make such orders or such regulations as they in fact made.

I do not think it is necessary to read all the rules which have been challenged, but I take the principal one, which is rule 8, and which is one of the collection which purports to deal with the procedure on these applications :

Where no notice of opposition is given and the amount claimed and costs have not been paid into court, then subject to the proviso hereinafter contained the facts stated in the notice of application shall be deemed to be admitted, and the court on the day appointed for the hearing may, without requiring attendance by or on behalf of the applicant, make an order for the recovery of the amount claimed and costs ; and for that purpose shall either appoint a receiver or if the applicant has stated in his notice of application——

that deals with another matter which does not arise here. That is the first point. It is not for us to criticise the rule, of course, or to say whether it is a wide rule or not, but it is just the kind of rule that those who had to deal with procedure on these matters would be likely to consider convenient. It says that where there has been no notice of opposition nor a payment into court, subject to the proviso which I will read presently, the facts stated in the notice of application shall be deemed to be admitted ; that is to say that those matters have not got to be proved in court, and thereupon the court has power, without requiring attendance by or on behalf of the applicant, to make the order asked for, amongst them the appointment of a receiver. Then there is a proviso to guard against the party being taken by surprise or unduly pressed :

Provided that if a respondent appears on the day appointed for the hearing of the application and desires to oppose the application the court may, but on such terms as to payment into court, costs or otherwise as the court thinks fit, appoint another day for the hearing in lieu of that originally appointed, in order that such respondent may file his notice of opposition.

Now as far as we can judge from the transcript, at the hearing, in view of the fact that the appellant was not represented by either solicitor or counsel, there was a certain amount of confusion, but so far as I have been able to see, he never defined what the particular points were on which he wished to challenge these applications, or led the court to believe that there was any reason why in his favour the power which the proviso which I have just read confers should be exercised. The learned judge did indeed offer him an adjournment. It does not appear that it was received with any great enthusiasm ; in fact, I think he did what he thought was wise, he stuck to his claim that he had a right to be heard then and there. However that may be, I think it is quite

possible that that offer of an adjournment must be taken to have been withdrawn before the order complained of and which the appellant attacks, was actually made. At any rate, in my opinion, looking at the whole thing, and bearing in mind that although the existence of a right of appeal is not fatal, or necessarily fatal, to a right to prohibition, still prohibition ought not to be lightly granted and ought to be granted only where there is a clear case of excess of jurisdiction on the part of the court, it is useful to remember that in this case the Act of Parliament, perhaps rather unusually, and possibly it was not actually necessary, did evidently think fit, in sect. 7, to call special attention to the matter of appeal, and to give an appeal if there should be any doubt as to whether it lie :

If any party in any action or matter under this Act shall be dissatisfied with the determination or direction of the judge of the county court in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court.

I think it is obvious from that, that that was contemplated as the normal way of challenging any order of the county court judge on any action arising under this Act, and it emphasises that which probably would have been equally the case anyhow, that in order to get the extreme remedy of prohibition, the effect of which is to treat the order and the appointment of a receiver as wholly bad, and merely a useless and idle form, the right of appeal is expressly and not merely by application of the general law conferred upon parties in the county court.

Perhaps I ought to call attention to one other matter, that is the case of *R. v. Pawlett* (1). It is not suggested that that case directly governs this ; but it certainly is a case of weight, and it must be considered. There are considerable differences between that case and this. The report is not very full, but I think I am right in saying that the rule was said there, and held by the court, to be bad because it cut down the provision of the statute with regard to the procedure on appeal to quarter sessions against the refusal of a certificate for a liquor licence. The rule which was brought into operation by the court of quarter sessions was not a rule enacted under an Act which gave a right of appeal, but was simply one of the general rules of procedure of the court of quarter sessions, and presumably, therefore, to be justified under the ordinary rule-making power which every court of the status of quarter sessions has the power to make *prima facie*, and, of course, on a matter on which the Act which was directly involved had made express provisions of its own. Upon that the Court of Queen's Bench held that the rule could not be justified and the court of quarter sessions could not be

relying upon one of their ordinary general rules of practice that there the appellant had not a right to be heard.

On the whole matter, therefore, in my opinion the learned judge was right in refusing to allow a writ of prohibition to issue, and the appeal must be dismissed.

ATKINSON, J. : I agree. It is not suggested in this appeal that the county court judge did not act in accordance with the rules under the Tithe Act, 1891, but the argument is that under sect. 2 of that Act the judge had jurisdiction to make the order in this case only after hearing the appellant if he appeared and desired to be heard. It is said that he did appear, that he did desire to be heard, and that he was in fact not heard. The question then arises whether the rules which have been published control or regulate this right to being heard. Mr. Montgomery says, quite frankly, they do regulate and control it, and, because they regulate it and control it, because they impose conditions upon the right of being heard, they are *ultra vires*. Well, in my judgment, the Act did not confer upon the respondent an unregulated right of audience. It seems to me that sect. 5 of the Act makes it quite clear that the rules and regulations contemplated by sect. 2 (7), and by sect. 3, may regulate the right of being heard. Under sect. 5 (2), there is a reference to a notice of opposition being given within a prescribed time, and the point of the subsection is that no costs are to be allowed for anything done by the applicant before he receives a notice of opposition. I repeat that seems to me to contemplate quite clearly that the rules and regulations which are to be made may include rules and regulations which will control the right of being heard, which the respondent in the case *prima facie* had. Of course, the rules and regulations which are made must be reasonable. There has been no suggestion here that they were unreasonable, always supposing that there was power to make them. If they were unreasonable, I have no doubt they would be *ultra vires*. But here, they were reasonable, and I should have thought beyond question. For myself, I see nothing in rule 8 which prevents a respondent who has not given a notice of objection and who does not desire an adjournment, asking to be heard on the basis that all allegations in the notice of claim are true. I think that very likely he would have a right to be heard on the question as to who should be appointed receiver, but in this particular case, as I read the shorthand note, the appellant did state that he desired to give notice of objection, and it was then for the learned judge to say whether or not an opportunity should be afforded. It is quite true that he began by saying he would give the appellant that opportunity, but after hearing the appellant, he changed his mind about that and declined to give an opportunity, by adjourning it, of giving notice of objections. But all that was well within his jurisdiction. If it was thought that he had exercised his discretion contrary to law

or equity, then, as my brother has pointed out, under sect. 7, the proper remedy would be one of appeal.

It seems to me that it is quite impossible here to say the learned county court judge acted beyond his jurisdiction, on the assumption that the rules which have been published are authorised by the Act. I think that they were authorised by the Act, and I think that they are reasonable and, being reasonable, are authorised by the Act and that there is no ground whatever for saying that the county court judge has exceeded his jurisdiction. It seems to me, therefore, that the appeal fails.

Solicitors : *Butt & Bowyer*, agents for *Rutter & Rutter*, Shaftesbury (for the appellant) ; *Solicitor to Queen Anne's Bounty* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

R. v. GLAMORGANSHIRE COUNTY COUNCIL, *Ex parte* COLLIER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parc and Goddard JJ.), April 23, 1936.]

Local Government—Local authority—Minutes—Inspection—By agent of elector.

The applicant desired by an agent skilled in accounts to inspect certain matters involving accounts and finance in the minutes of a county council. The county council refused to allow the agent to inspect the minutes, whereupon a rule *nisi* was obtained for a writ of mandamus to issue to the county council to allow inspection by such agent. The county council later withdrew their opposition.

The court upon a full statement of the position made the rule absolute.

[EDITORIAL NOTE.] It was decided in *R. v. Bedwellty U.D.C., Ex p. Price*, [1934] 1 K.B. 333; Digest Supp., that the accounts of a local authority may be inspected by an agent of a local government elector. The present case extends that decision to the inspection of minutes. Although the case was not seriously contested it would seem that the court took a clear view that any contest of the case would have been of no avail.

FOR THE INSPECTION OF MINUTES OF A LOCAL AUTHORITY, see HALSBURY, 1st Edn., Vol. 19, p. 316, para. 316, and FOR CASES, see DIGEST, Vol. 33, p. 55, No. 336 and p. 101, Nos. 682-685. FOR THE PRESENT STATUTORY ENACTMENT ON THE POINT see the LOCAL GOVERNMENT ACT, 1933, s. 283, set out in HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 455.]

APPLICATION to make absolute a rule *nisi* granted for a writ of mandamus to issue to the Glamorganshire County Council to allow the applicant by his agent to inspect certain matters in the minutes of the county council involving accounts and finance.

A. S. Comyns Carr, K.C., and *T. Leslie David* for the applicant.

The Glamorganshire County Council did not appear and were not represented.

Comyns Carr, K.C. : Communications have passed between the county council and ourselves with regard to this matter. It is only necessary shortly to explain what the point of the matter is and read the letters that have passed between the parties. The applicant is a ratepayer in the County of Glamorgan and also a member of a body known as the South Wales and Glamorganshire Public Economy Association, and he, being interested in the expenditure on behalf of that body of the Glamorganshire County Council, desired to inspect certain matters in the minutes of the county council involving accounts and finance. Not being skilled in the matter, he desired to do that by means of an agent skilled in accounts.

LORD HEWART, L.C.J. : There have been other cases of that kind before.

Comyns Carr, K.C. : There have. The Glamorganshire County Council refused at first to allow the agent to inspect on the ground that, although this court had held that the accounts of the council might be inspected by an agent, that did not apply to the minutes. In consequence of that, we moved for the rule which was granted. Then the county council appear to have considered the matter further, and they wrote to say they were prepared to allow the agent to inspect. I am only here to-day in order that your Lordships may be informed of the matter, and that it may be publicly made clear that the ratepayers have this right which has been in various forms challenged in various parts of the country.

LORD HEWART, L.C.J. : But, I think, never with success. Are you asking for the rule to be made absolute ?

Comyns Carr, K.C. : Yes, my Lord, I am asking for the rule to be made absolute without costs, but only for the costs of the application for the rule which is consented to.

LORD HEWART, L.C.J. : Very well, the rule is made absolute without costs, the county council consenting to pay your costs of the application for the rule *nisi*.

Solicitors : *Willis & Willis*, agents for *Gilling & Goodfellow*, Cardiff (for the applicant).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

McGOWAN *v.* ASSESSMENT COMMITTEE FOR OSGOLDCROSS
ASSESSMENT AREA, WEST RIDING OF YORKSHIRE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard,
JJ.), April 29, 1936.]

*Rates—Industrial hereditament—Printing works with shop—Rating and
Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1).*

The appellant occupied an hereditament consisting of a printer's works and shop, which did not form a large part of the business, but in which some orders for printing work were received. All the printing work was done in fulfilment and not in expectation of orders. A newspaper was printed on the premises. The premises had until January, 1934, been rated largely as an industrial hereditament, but the assessment committee then altered the rating to general. Quarter sessions held on appeal that this was an industrial hereditament. The assessment committee appealed:—

HELD: the hereditament was industrial, for it was primarily occupied and used as a factory, for the purpose of doing work and labour in accordance with orders given by customers, and the handing over of and receiving payment for the work did not make the premises a retail shop.

[EDITORIAL NOTE.] The point here is what premises are included in the term "industrial hereditament" for derating purposes. There are many cases where premises are used partly as a factory and partly for the purposes of retail trade, and though each case must, of course, be decided according to its own particular circumstances, the present one is quite representative of a printing business and was said to be a test case in this regard.

AS TO DERATING, see HALSBURY, Supp. to Vol. 24, Rates, para. 88; and FOR THE CASES, see DIGEST Supp., Rates, Nos. 226 (a)—226 (pp.).]

Cases referred to:

- (1) *Finn (Wimbledon Revenue Officer) v. Kerslake*, [1931] A.C. 457, 485; Digest Supp.
- (2) *Turpin v. Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 451, 470; Digest Supp.
- (3) *Wilkinson (Taunton Revenue Officer) v. Sibley & Donovan*, [1932] 1 K.B. 194; Digest Supp.
- (4) *Toogood & Sons, Ltd. v. Green*, [1932] A.C. 663; Digest Supp.

APPEAL by way of case stated from a judgment of the recorder at Pontefract Quarter Sessions given on Jan. 24, 1936.

The appellants were the assessment committee for the area which includes the Borough of Pontefract. The respondent was the occupier of an hereditament consisting of a printer's works and shop in a court off the Cornmarket, Pontefract. The stationer's shop was not a very large part of the business, but some orders for the printing business were handed over the shop counter. The whole of the printing work done on the premises was in fulfilment and not in expectation of orders. The respondent also printed a newspaper on the premises. This hereditament had been included as an industrial hereditament by the

rating authority and had been rated as follows: as industrial hereditament, £45; non-industrial, £18; making a total of £63. The assessment committee on Jan. 31, 1934, altered this rating from industrial to general. The occupier objected to this amendment, claiming that the printing works was an industrial hereditament. On July 25, the objection was heard and considered by the appellants, and they determined that the hereditament was not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3. On an appeal to quarter sessions it was held that the premises should be included as an industrial hereditament.

The assessment committee appealed.

D. N. Pritt, K.C., and *C. L. Henderson* for the appellants: If the one hereditament contains the place where a man takes his orders and delivers the finished product, it is a retail shop. A jobbing printer on the premises where he accepts the orders and delivers most of his goods is carrying on a retail trade. If on one premises a man is making stuff and selling it, it may be said that the making of it is the more important, but it is laid down in point of law that the last thing is the most important and that the man is making to sell and not making for the purpose of selling. If a man is making in one place for selling in another, the law does not look beyond the hereditaments where he is making. If I set up a large business to print tramway tickets which I am going to sell elsewhere, it would not be a retail business. If the submission that the premises were used for the purpose of a retail shop is right, the printing and distribution of the newspaper called *The Guide* is not sufficient in volume to prevent the jobbing printing business from being a retail business.

A. S. Comyns Carr, K.C., and *J. Scott Henderson*, for the respondent, were not called upon.

LORD HEWART, L.C.J.: This is an appeal by way of special case stated, and, if I may say so, extremely well stated, by the learned recorder for the Borough of Pontefract. In my opinion, the learned recorder was clearly right for the reasons which he has given. At first blush one would say, looking at the facts and on the plan, that these premises were occupied for the purposes of a printing works, and, in my opinion, it is immaterial that there was attached to part of these premises a small shop where some business of a shop was done. It is conceded at the bar that the existence of that shop ought not to sway and could not sway the case as a whole. Our attention has been directed to the various cases in which cognate matters have been considered. Every one of those cases is an authority upon the facts with which it deals; but, in my opinion, there is no case which goes even a considerable distance towards contradicting the conclusion to which the learned recorder came in this case.

In the case of *Finn v. Kerslake* (1), the business was the business of selling bread and cakes. The bread and cakes were made to be sold in the ordinary retail way. The bread and cakes were made for the purpose of stocking a shop. There was no difficulty in holding that that was a shop. In the case of *Turpin v. Middlesbrough Assessment Area* (2) and the other cases heard with it, it was held that the subject-matter was premises used for the repair of motor cars. It is obvious that the judgments turned upon what is sometimes called a specific allusion to and sometimes the specific mention of repairs under the statute. In the case of *Wilkinson v. Sibley* (3), the hereditament was used for the purposes of bespoke tailors; but there *ex concessis* there was a unified business which could not be dissected. This case is the antithesis of that case. Here there is no unified business and, even if for some purposes it was said to be unified, it can be and in fact has been dissected. Finally, the case of *Toogood & Sons, Ltd. v. Green* (4) does not militate in the least against the finding of the learned recorder. On the contrary, if I may respectfully say so, it sheds a useful light upon the importance in all cases, and not least in these cases, of looking at the particular facts.

In my opinion, the learned recorder was right in the conclusion at which he arrived, and this appeal must be dismissed.

DU PARCQ, J.: I agree. My Lord has dealt with the cases which have been cited to us, and I do not propose to say any more about them. I should like to add this only. There is one sentence in the speech of VISCOUNT DUNEDIN when he was dealing with *Turpin's* case (2) which I think it may perhaps be useful to quote. There the learned Lord said, at p. 473:

The matter seems to me simply a question of attributing an every day meaning to the words used in the definition.

If I am to try to do that, I find this, first of all, that in the Act the expression "industrial hereditament" means an hereditament occupied and used as a factory. One starts with that and nobody doubts that this hereditament was occupied and used as a factory. Then comes the proviso:

Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes,

among other purposes, "the purposes of a retail shop."

Would anybody using words in their everyday meaning say that a place where one could go and order the printing of circulars, bill heads, a magazine, a book, or visiting cards to one's order and specification was a retail shop? The answer appears to me clearly to be: No. The only other words which have to be taken into account are the words:

"Retail shop" includes any premises of a similar character where retail trade or business (including repair work) is carried on.

Nobody reading those words and giving them their everyday meaning would say, I should think, that those last words show that, even though nothing is sold upon the premises and all that is done is to execute repairs, the premises may be a retail shop. No question of that sort arises in this case. There is here no question of repairs. This hereditament was used as a factory and was used primarily, in my view, for the purpose of doing work and labour in accordance with orders given by members of the public. It is true that when the work and labour has been done and the orders executed something takes place which in law amounts to a sale; but nobody using words in their everyday meaning would say that a printing works, although ultimately a chattel is to be delivered when the bill heads, circulars or whatever it may be, are handed over and the money paid for them, was a retail shop. As I think, nobody would ever say that he was going to the appellant's shop in order to buy a thousand circulars when what he was going to do was to call at the printing works to give an order for the printing of a thousand circulars.

I agree with my Lord, and I am glad to think that there is nothing in the decided cases to compel us to come to a conclusion which, if I look only at the words of the Act, would involve giving to them what seems to me to be plainly a meaning that they could not bear. I agree that this appeal should be dismissed.

GODDARD, J. : I agree and have nothing to add.

Appeal dismissed with costs.

Solicitors : *Pritchard, Sons, Partington & Holland*, agents for *Hartley & Worstenholme*, Castleford (for the appellants); *Blundell, Baker & Co.*, agents for *Carter, Bentley & Gundill*, Pontefract (for the respondent).

[*Reported by W. K. SCRIVENER, Esq. Barrister-at-Law.*]

CORPORATION OF CITY OF GLASGOW v. ROBERTSON OR CAMERON.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Atkin, Lord Thankerton Lord Macmillan and Lord Maugham), **April 27, 28 and May 7, 1936.**]

Practice—Third party notice—Discretion of court to allow—Effect of notice to involve plaintiff in costly litigation, which may otherwise be avoided.

A passenger in a private motor car belonging to and driven by her husband sustained injuries as a result of a collision with a Glasgow Corporation tramway car. She sued the corporation for damages on the ground of negligence on the part of a servant of the corporation. In their pleadings the corporation averred that the husband was solely to blame for the accident. After the close of the pleadings the corporation, in terms of the Rules of the Court of Session, 1934, proposed a counter-issue of negligence on the part of the husband and asked for an order for service of a third party notice upon him. The court held that the corporation had not relevantly pleaded a right of contribution against

the husband to bring the case within the rules, whereupon the corporation asked for leave to amend their pleadings by adding averments of an alternative case alleging that, on the assumption that their servant was negligent, the collision was materially contributed to by the negligence of the husband, against whom the corporation claimed a right of contribution, relief, or indemnity. There is a decision of the Second Division of the Court of Session against the right of the wife to recover from the husband in such a case and the addition of the husband as third party would probably necessitate the case being taken to the House of Lords :—

HELD : this was not a case in which the discretion of the court should be exercised in favour of allowing a third party notice to be served. Leave to amend the pleadings was, therefore, refused and the appellants' proposed counter-issue was disallowed.

[EDITORIAL NOTE.] It may be taken that although this is a Scottish case, the rules in both countries are the same. The point is a short one. The liability of the third party was settled by authority in the Inner House of the Court of Session and the result of the addition of such third party would mean that the case would have to be taken to the House of Lords. The proper exercise of the discretion of the court in such a case is not to allow the addition of the third party, since, if the plaintiff fails upon the facts much litigation will be avoided thereby.

AS TO THIRD PARTY PROCEDURE, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 162, 163, para. 288; and FOR CASES, see DIGEST, Practice, pp. 447, 448, Nos. 1362-1370. FOR THE ENGLISH RULE OF COURT, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 248-255.]

Cases referred to :

- (1) *Harper v. Harper*, [1929] S.C. (Ct. of Sess.) 220; Digest Supp.
- (2) *Palmer v. Wick & Pulteneytown Steam Shipping Co.* (1894), 21 R. (H.L.) 39, [1894] A.C. 318; 42 Digest 980, 105.
- (3) *Allen v. M'Combie's Trustees*, [1909] S.C. (Ct. of Sess.) 710; 43 Digest 1029, case 4695 (i).

APPEAL from an interlocutor of the First Division of the Court of Session (the LORD PRESIDENT (LORD CLYDE), LORD BLACKBURN, LORD FLEMING; LORD MORISON dissenting) refusing leave to amend the pleadings, refusing to make an order for service of a third party notice, and disallowing the appellants' proposed counter-issue.

The material part of the pleadings and the arguments appear from the judgment.

D. P. Blades, K.C., and *G. A. Montgomery* for the appellants.

J. R. Wardlaw Burnet, K.C., and *T. P. McDonald* for the respondent.

LORD BLANESBURGH: My Lords, I have had the advantage of seeing in print the opinion which has been prepared by my noble and learned friend, LORD THANKERTON, and which he is about to deliver. I entirely agree with that opinion and with the motion with which he will conclude that this appeal be dismissed.

LORD ATKIN: My Lords, I also have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend. I entirely agree with it, and have nothing to add.

LORD THANKERTON: My Lords, this action arises out of a collision

which took place in Sauchiehall Street, Glasgow, on Apr. 23, 1934, between a corporation tramcar and a motor car, in which the respondent was a passenger and which was being driven by her husband.

In Aug., 1934, the respondent raised an action in the Sheriff Court against the appellant corporation, claiming a sum of £200 in respect of injuries received by her in the accident, on the allegation that the accident occurred through the fault of the driver of the tramcar. The appellants defended the action on the denial of any fault on the part of the driver of the tramcar and on the allegation that the collision was solely due to the fault of the driver of the motor car. After a hearing, the sheriff substitute repelled the appellants' plea to relevancy and allowed a proof. The cause was then removed by the respondent into the Court of Session for jury trial, and the cause was sent to the Summar Roll of the First Division on Dec. 18, 1934.

The respondent lodged a proposed issue in ordinary form, and the appellants then lodged a proposed counter-issue and a minute of amendment, the purpose of both of which was to enable the appellants to take advantage of the Rules of Court, 1934, r. 20 (*d*), by moving for an order of court for service of a third party notice on the respondent's husband, the driver of the motor car. The counter-issue was as to whether the accident was caused through the fault of the respondent's husband. The proposed amendments averred alternatively (and on the assumption that the driver of the tramcar was at fault) that, in any case, the accident was materially contributed to by the fault of the driver of the motor car. Somewhat ambiguously, neither the original defences nor the proposed amendments overtly state the admitted fact that the driver of the motor car was the husband of the respondent, a fact which presented the kernel of the difficulty in the appellants' way. This was owing to a previous decision of the Court of Session in the case of *Harper v. Harper* (1), in which it was held by the Second Division that an action of damages by a wife against a husband in respect of a wrong done by him to her was incompetent at common law, and that the Married Women's Property (Scotland) Act, 1920, had not altered the law in that respect. That action arose out of a collision between a motor lorry and a motor car, which was owned and driven by the pursuer's husband and in which the pursuer was a passenger at the time. The owner of the lorry and the husband were both called as defenders, on the allegation that the accident was due to the fault of both of them.

In the present case, after a hearing, the First Division, on Mar. 13, 1935, disallowed the proposed amendment and the proposed counter-issue and refused the motion for an order for service of a third party notice. The present appeal is from that interlocutor. LORD PRESIDENT CLYDE says :

The difficulty is that, as the law stands, the pursuer's husband cannot be made

answerable to the pursuer for personal injuries inflicted on her by him *ex delicto* (*Harper v. Harper* (1)) ; and, as the obligation of a joint wrongdoer to contribute to the damages caused by his own and his co-delinquent's misdoing rests on nothing but the general right of the co-obligant who pays the debt to have it assigned to him, for his own relief, by the creditor (*Palmer v. Wick and Pulteneytown Steam Shipping Co.* (2), see especially at p. 40) it seems plain that the corporation cannot place itself, or be placed, in a position to claim relief or contribution from the pursuer's husband, because the pursuer could not assign in their favour a claim which the law denies her. In these circumstances, the proposed amendment must be refused as irrelevant ; and the necessary conditions for an order for the service of a third party notice are not present.

LORD BLACKBURN and LORD FLEMING expressed a similar opinion. LORD MORISON dissented on the ground that it was undesirable to decide any question regarding the relevancy at that stage, and that the amendments should be allowed and the case sent to proof instead of jury trial. I think that it is implied in his opinion that he would have granted the motion for a third party notice, and, after the necessary procedure consequent thereon, would have sent the case to proof before answer.

My Lords, it appears to me that, being bound by the decision of a court of co-ordinate jurisdiction in *Harper's* case (1), the majority of the learned judges disposed of the matter on the ground of the irrelevancy of the proposed amendments, and did not find it necessary to consider the exercise of the "complete discretion" as to granting the order for service of a third party notice, which is conferred on the court by rule 20 (d). It follows that the situation before this House is somewhat different, in that the principle of the decision in *Harper's* case (1) is open to reconsideration by your Lordships. But, while it may be open to the appellants to say before this House that the decision in *Harper's* case (1), is not a sufficient objection to the allowance of the amendments, it is still clear that the mere allowance of the amendments will not serve the appellants' purpose unless the order for the third party notice is to follow, for the respondent is entitled to proceed against one co-delinquent alone, and she has no concern with any claim by the latter against an alleged co-delinquent for contribution. Any such claim would not be prejudiced by a verdict against the appellants on the issue proposed by the respondent. (*Palmer's* case (2), and *Allen v. McCombie's Trustees* (3), per LORD DUNEDIN at p. 718.) Accordingly, although, logically, the allowance of the amendments falls to be disposed of first, it is necessary, for that purpose, to consider whether the discretion vested in the court should be exercised in favour of the appellants' motion for an order for service of a third party notice. In view of their grounds of decision, it was unnecessary for the First Division to consider this question, and it therefore falls to your Lordships to do so.

My Lords, I have come very clearly to the opinion that this is not a case in which a third party notice should be allowed. In the first place,

it was suggested by the appellants that the correctness of the decision in *Harper's* case (1), should be considered and disposed of at this stage, but that course is open to the fatal objection that the only proper contradictor of the appellants on this point, the husband, is not a party to the appeal. If the appellants' motion is refused, this small claim will be tried by a jury without further delay, and the opportunity of review of their verdict will be very limited. If such verdict is in the appellants' favour, the present question will never arise. If the verdict is against them, the present appellants may raise their claim for contribution from the husband, and pursue it to this House, but the present respondent will not be a party to such an action. On the other hand, if the appellants' motion be granted, the almost certain prospect of a further appeal to this House will be added, with all the additional expense and delay. In my opinion, the pursuer of such a small claim as is made here should not be exposed to such an alternative, and I am clearly of opinion that the motion should be refused, from which refusal to allow the amendments or the counter-issue will necessarily follow.

I am therefore of opinion that the interlocutor appealed from should be affirmed and that the appeal should be dismissed with costs.

LORD MACMILLAN : My Lords, I concur.

LORD MAUGHAM : My Lords, I also concur.

Appeal dismissed with costs.

Solicitors : *Martin & Co.*, for *Campbell Smith Mathison & Oliphant*, W. S., Edinburgh, and Town Clerk, Glasgow (for the appellants); *Wedlake, Letts & Birds*, for *J. & A. Hastie, S.S.C.*, Edinburgh, and *A. C. Baird, Mackenzie & Co.*, Glasgow (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

CROMIE v. MOORE.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), **May 4, 1936.**]

Practice—Writ of summons for breach of contract—Service out of the jurisdiction—Evidence of contract with defendant—R.S.C. Ord. 11, rr. 1 (e), 4.

A plaintiff obtained leave to serve notice of a writ for breach of contract on the defendant out of the jurisdiction. The defendant appealed, submitting that the statement of claim, affidavit, and letters attached did not show a contract between the plaintiff and the defendant, but only between the plaintiff and a co-director of the defendant acting as agent for a company of which the defendant was chairman :—

HELD : as there was no reasonable evidence that a contract had been made with the defendant, leave for service out of the jurisdiction should not have been given.

[EDITORIAL NOTE.] In order that an order may be made for service out of the jurisdiction in an action founded on a contract there must be *prima facie* evidence

of a contract between the plaintiff and the defendant. The court in the present instance considered the letters in the case to decide whether the contract was made with the defendant or with a company of which he was chairman.

FOR SERVICE OUT OF THE JURISDICTION, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 117-120, para. 208; and FOR THE CASES, see DIGEST Practice pp. 344-346, Nos. 610-622. FOR R.S.C. ORD. 11 rr. 1 (e), 4, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 84-91, 99-101.]

Case referred to :

- (1) *Hemelryck v. Lyall Shipbuilding Co.*, [1921] 1 A.C. 698; Digest Practice, 345, 613.

APPEAL by the defendant against an order of MACNAGHTEN, J., made in chambers, dismissing an application by the defendant to set aside an order of GREAVES-LORD, J., giving leave to serve notice of a writ on the defendant out of the jurisdiction.

The plaintiff was an architect; the defendant was chairman and a director of Irish Electric Palaces, Ltd. The plaintiff claimed that another director of this company, acting as agent for the defendant, had commissioned the plaintiff to prepare plans for a large cinematograph theatre and had subsequently repudiated the agreement. The allegations were not material. The plaintiff's affidavit in support of the application for leave for service out of the jurisdiction exhibited two letters, the relevant parts of which are quoted in the judgments. GREAVES-LORD, J., on an *ex parte* application granted leave to serve in Northern Ireland. MACNAGHTEN, J., refused an application to vary the order and refused leave to appeal on the ground that the matter was discretionary. The Court of Appeal gave the defendant leave to appeal.

John Morris, K.C., and *H. C. Dickens* for the appellant: The learned judge had before him, in the statement of claim, the affidavit, and the exhibited letters, no evidence that a contract had ever been made between the plaintiff and the defendant. The documents relate only to an agreement between the plaintiff and a co-director of a company of which the defendant is a director and chairman.

F. van den Berg, K.C., and *Constantine Gallop* for the respondent.

GREER, L.J.: We accept the statement that has been put before us that a concession was made before the learned judge that if there was reasonable evidence that any contract had been made between the plaintiff and the defendant then the jurisdiction to make an order was not in dispute. I think it highly improbable, however, that there ever was any contract, having regard to the documents that passed between the parties. On the question as to whether there was reasonable evidence of any contract made either in London or in Belfast between the plaintiff and the defendant under which the defendant made himself responsible for the payment of a considerable sum for the preparation of plans, which were prepared not for him but for the company of which he was chairman,

I act upon the view expressed by LORD BUCKMASTER in *Hemelryck v. Lyall Shipbuilding Co.* (1), at p. 701 :

For the purpose, however, of enabling the discretion which is conferred by the rules to be exercised, it is sufficient if there appears reasonable evidence that a contract has been made, unless, indeed, the defendant is in a position to satisfy the court that such evidence should be disregarded and that in fact there was no contract at all.

The first limb of that sentence says that it is sufficient if there appears reasonable evidence that a contract has been made. Now the learned judge, who declined to discharge the order for service out of the jurisdiction, had before him the statement of claim, and the way in which the statement of claim purports to make a case against the defendant is this. It is said that there were two letters, which quite clearly do not make a contract in writing between any parties, and therefore, in order to make out that there is reasonable evidence of a contract, we have to go to the alternative view expressed in para. 1 of the statement of claim, that :

The said agreement was made by the oral acceptance by the defendant of the proposals contained in the said letter of May 8, 1934, expressed by the defendant to the plaintiff at Belfast on or about June 11, 1934.

That allegation means that the proposals which are contained in the two letters were accepted by Mr. Moore at an interview in Belfast ; but the two letters in question, the letters which were written, not by Mr. Moore, but by Mr. Murray Bass, who is said to be one of the directors of some of these companies, do not purport to be written on behalf of anybody except the company on whose letter-paper they were written. The first letter is written to Mr. Cromie with a heading " Alhambra Theatre, Ltd. " and a number of other theatres. " You may remember my calling with you about a year ago and leaving you a ground plan of property we had acquired in Bangor. " Now, who had acquired in Bangor ? As I understand, the evidence before the learned judge was that it had been acquired in Bangor by Irish Electric Palaces, Ltd., one of the companies mentioned on the heading of the letter, and therefore I treat this letter as being written on behalf of the company that had acquired a large piece of vacant ground, the property mentioned in the letter which had been acquired by that company in Bangor. But that letter and the other letter relied on, which I need not refer to, do not constitute a contract ; they constitute negotiations for a contract.

Then it is alleged in the statement of claim that there was an acceptance in Belfast of the offer made by Mr. Cromie in the two letters to prepare plans ; that would be an acceptance of an offer made on behalf of the owners of the land, namely, Irish Electric Palaces, Ltd. There are quite a number of other letters in the correspondence which seem to show that the plaintiff knew quite well that he was dealing with the company,

and in so far as he was asking Mr. Moore to send him a cheque he was asking him to send him a cheque on behalf of the company and not necessarily as one of the contracting parties. In my judgment the first limb of the proposition laid down by LORD BUCKMASTER in the passage I quoted was not established before the learned judge. Accordingly, there being no reasonable evidence of any contract made with the defendant either within or without the jurisdiction, no order ought to have been made for service out of the jurisdiction; and having been made *ex parte* it ought to have been discharged when the matter came before MACNAGHTEN, J., on the hearing of the application by the defendant to discharge the order.

I do not think it necessary to refer in detail to the letters. My attention has been called by GREENE, L.J., to the fact that on Jan. 1, 1935, this letter was written by Mr. Boyd, secretary of Irish Electric Palaces, Ltd., to the plaintiff:

We opened your letter of the 19th ultimo addressed to our Mr. Moore, as he is in Switzerland, and is not expected back until the end of the present month; under the circumstances we think it is better for you to keep the plans in London. We have forwarded your letter to him and he will, no doubt, call with you on his way home. We enclose cheque fifty guineas for the rough sketch plans, as per your letter of May 8, 1934; the matter of the further plans can be settled with Mr. Moore when he calls with you as the writer has no instructions with regard to same.

The opening words indicate that "our Mr. Moore" was the Mr. Moore who represented Irish Electric Palaces, Ltd., and that they had opened a letter addressed to the chairman because he was in Switzerland. The payment of 50 guineas was made by means of a cheque, and this letter is signed, "For Irish Electric Palaces, Ltd., S. H. Boyd, Secretary." Then the cheque is made out by the company and is accepted by the plaintiff as a payment made under the contract and a receipt is given by him. There are other letters which point in the same direction, the result being that I have come to the conclusion (and I think my brethren also) that the condition referred to by LORD BUCKMASTER has not been complied with and therefore the order ought to have been discharged. I should like to say by way of qualification that that decision on this summons does not and cannot operate as an estoppel between the parties when the case comes for trial, because there may be more evidence at the trial than we have had before us on the hearing of this appeal from an order in chambers. For these reasons, I think the appeal ought to be allowed, with costs.

GREENE, L.J.: I agree. It is perfectly true in this case that the plaintiff in his affidavits in support of the application has sworn that the contract was made between himself and the defendant. I do not, of course, suggest for one moment that that was sworn in any way other than in the way of perfect honesty and *bona fides*, but I can attach very

little importance to a statement of that kind when the documentary evidence relating to the contract all points, as far as I can see, in the opposite direction. There is nothing in this correspondence to suggest, to my mind, any contract made with the defendant at all. On the other hand, there is a great deal in it which suggests that the contract was made with the company whose name has been mentioned, Irish Electric Palaces, Ltd. That does not mean, of course, as my Lord pointed out, that the plaintiff at the trial may not be able to establish the contract on which he relies. The sole question with which we have to deal is as to the evidence of such contract before us on this application.

I only wish to add one word about the letter of Jan. 1, 1935, to which my Lord has referred. It is perhaps worth observing that it ends with these words: "the writer has no instructions with regard to same." That quite clearly means this: that "the writer," namely the secretary of Irish Electric Palaces, Ltd., in that capacity is a person who may expect to receive instructions from a gentleman whom he calls "our Mr. Moore." On the face of that letter it appears to me as clear as anything can be that the plaintiff was aware (if he did not know it already) that the party with whom he was contracting was Irish Electric Palaces, Ltd. It is important to notice that that letter was written about a month before the letter of Feb. 4, upon which the plaintiff relies in his statement of claim as containing orders for variations of the contract or additional work to be performed, and therefore, when he received that letter of Feb. 4, he received it with the terms of the letter of Jan. 1 in his mind. In my opinion, as I have said, the documentary evidence in this case destroys the value of what the plaintiff has said in his affidavit, but that, of course, is without prejudice to anything he may be able to prove at the trial.

TALBOT, J.: I am of the same opinion.

Order for service out of the jurisdiction set aside, with costs.

Solicitors: *Hempsons* (for the appellant); *Forsythe, Kerman & Phillips* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

**Re LUNACY ACT, 1890. Re AN INTENDED ACTION
BY FROST.**

[COURT OF APPEAL (Greer and Greene, L.JJ.), **May 6 and 7, 1936.**]

Lunatics—Wrongful detention—Application for leave to bring action—Mental Treatment Act, 1930 (c. 23), s. 16 (2).

The plaintiff, aged 75, on Aug. 24, 1935, having attended his wife's funeral, became highly excitable and commenced drinking heavily. Upon the request of his daughter, a doctor in a letter recommended him for hospital treatment and to be kept under observation. The local authority then sent an ambulance to his home in which he was removed to an institution. He was there examined by the assistant medical officer and put into a mental ward. The medical officer later issued a certificate for his detention, although he had not personally examined him. After four days detention in the mental ward the plaintiff was moved to the ordinary male medical ward. On Sept. 9 his daughter asked for his removal home and he was allowed to return home on the following day:—

HELD: in acting upon the doctor's letter, which was not a certificate within the statutory requirements, the local authority had acted without reasonable care, and leave under the Mental Treatment Act, 1930, s. 16 (2), ought to be given to the plaintiff to bring an action in respect thereof against the local authority. The claim must be restricted to the first four days.

[EDITORIAL NOTE.] The Mental Treatment Act, 1930, s. 16, shifts the onus of proof of absence of good faith and want of reasonable care in cases of wrongful detention and also makes it necessary for the plaintiff to obtain the leave of the court to bring the action. In this case for the first time the views of the Court of Appeal upon the principles which should guide the court in granting such leave are given. In considering these matters it must be borne in mind that it is only in the case of actions brought in respect of acts done pursuant to Medical Treatment Act, 1930, s. 16 (1) (i) that leave is required.

AS TO ACTIONS FOR WRONGFUL DETENTION, see HALSBURY, 1st Edn., Vol. 19, Lunatics, p. 530, para. 1122, and Supp.; and FOR CASES, see DIGEST, Vol. 33, pp. 271, 272, Nos. 1893-1896, and Supp. FOR THE MENTAL TREATMENT ACT, 1930, s. 16, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 169.]

Cases referred to:

- (1) *Shackleton v. Swift*, [1913] 2 K.B. 304; 33 Digest 272, 1896.
- (2) *Evans v. Liverpool Corpn.*, [1906] 1 K.B. 160; 34 Digest 550, 86.
- (3) *Strangeways-Lesmere v. Clayton*, [1936] 1 All E.R. 484.

INTERLOCUTORY APPEAL from an order of GODDARD, J., made on April 7, 1936, granting leave under the Mental Treatment Act, 1930, s. 16 (2), to one Frost to bring an action against the Kingston-upon-Hull Corporation for false imprisonment and wrongful detention as a person of unsound mind. The matter originally came before the master on Mar. 6, 1936, when he refused leave to bring the action.

On Aug. 25, 1935, the applicant, Robert John Frost, a pauper, aged 75, was removed in an ambulance from his home by servants of the appelland corporation and taken to the Anlaby Road Institution, Kingston-upon-Hull. On the previous day, a Saturday, he had buried his wife and had since then been in a highly excitable condition and

drinking heavily. Upon the request of his daughter, a Dr. Dean wrote the letter set out in the judgment.

Upon receipt of this letter, by hand, some person in authority at the institution dispatched an ambulance with one driver and an attendant, and Frost was duly conveyed from his home to the institution. He was then examined by Dr. Jean Menzies Barrowman, assistant to the senior medical officer, Dr. Macrae Todd. He was then taken to a mental ward and no further examination was made. A certificate was issued for his detention by Dr. Macrae Todd, although he had not personally examined the applicant. After four days it was deemed unnecessary to keep him in the mental ward any longer and he was accordingly moved to the ordinary male medical ward. On Sept. 9 his daughter asked for his removal home, which was carried out on Sept. 10. He was subsequently examined by two independent doctors who found no sign of mental incapacity, and after considerable correspondence between the applicant's solicitors and the town clerk, notice of these proceedings was given on Feb. 22, 1936, sixteen days before the expiration of the six months after which the corporation would be protected by the Public Authorities Protection Act, 1893. The matter came before Master Ball on Mar. 6, 1936, and he refused leave to bring the action. By an order dated Apr. 7, GODDARD, J., granted such leave, and from that order this appeal was brought.

C. M. Picciotto, for the appellants: There is a striking change of language in the new Act and it is manifest that the legislature intended to make proceedings such as these difficult to bring. The learned master thought that leave should be refused. The applicant must show the court that there is a strong probability that he will succeed and that there are substantial grounds for contending bad faith and want of reasonable care on the part of the corporation. He has not discharged this obligation. He was admitted on Dr. Dean's letter. He was examined that same evening and a certificate granted under the Lunacy Act, 1890, s. 24. Subsect. (2) of this section enacts:

A certificate under this section shall be sufficient authority for detaining the lunatic therein named against his will in the workhouse for fourteen days from its date.

Despite that, he was moved to an ordinary ward after only four days. No complaint was made until Sept. 9, when his daughter asked for him to be taken home, which was complied with the following day. The attendants did not force him into the ambulance. They acted in the most reasonable way, and had the assurance of two persons present at the house that they would take the responsibility. Dr. Dean's suggestion that he should be kept under observation indicated that he was a potential mental patient. *Evans v. Liverpool Corporation* (2), *Strangeways-Lesmere v. Clayton* (3). There is no independent evidence of lack of reason-

able care. The fourteen days were covered by Dr. Todd's certificate. So far as the respondent needed leave under Mental Treatment Act, 1930,

s. 16, it was wrongly given and as to matters for which he did not require such leave, no leave ought to have been given.

George Waller (with him *Clive W. Salter*) for the respondent: The transaction should be looked at as a whole. It is one act of false imprisonment. He was enticed outside his door by a trick and detained sixteen days against his will. He is entitled to compensation for the interference with his individual liberty. If what was done was not done under the Act, it was wrong and the subsequent certificate could not right it. The corporation purported all along to be acting under the statute, and they are therefore responsible even if they had not in fact power or jurisdiction to do what they did. Dr. Todd should not have given that certificate on the information of other people. The Lunacy Act, 1890, s. 28 (2), says:

Every medical certificate upon which a reception order is founded shall state the facts upon which the certifying medical practitioner has formed his opinion that the alleged lunatic is a lunatic, distinguishing facts observed by himself from facts communicated by others; and a reception order shall not be made upon a certificate founded only upon facts communicated by others.

There was no reception order and could not have been since it was Dr. Barrowman who examined the applicant and Dr. Todd who purported to sign the certificate. The Acts are designed for the protection of the individual as well as the authorities. The learned judge was justified on the evidence in granting leave.

GREER, L.J.: In this appeal it has not been necessary to deal with all the questions raised, but we have come to the conclusion that we ought not to disturb the order of the learned judge in so far as he gave leave for an action to be brought in respect of the damage which the applicant had suffered from his detention up till Aug. 29, that is to say, from the time when he was taken away in the ambulance until the expiration of the four days during which he was detained in the mental ward.

The appellants' first point is that the learned judge was not justified in making the order with regard to the period from the taking away in the ambulance until the giving of the certificate of Dr. Todd, because the learned judge ought to have come to the conclusion on the evidence that the acts of the agents of the corporation, up to the time of that certificate, were not acts which were done pursuant to the statute, and accordingly no leave was required under the Mental Treatment Act, 1930, s. 16—and that, even if we might be of the opinion that the evidence before the learned judge was insufficient to enable him to adopt the view that what was done by the corporation's servants during that period was done pursuant to the Act. That does not necessarily mean within their

powers under the Act, or as you might say, their jurisdiction. I agree with the view taken by VAUGHAN WILLIAMS, L.J., in *Shackleton v. Swift* (1), at p. 316, where he says :

Under those circumstances, in my judgment, without going at further length through the Act of Parliament, I decide this question upon the ground that this Act of Parliament gives special protection to those officers and others acting under the powers of this Act in cases where, although they may have misconstrued the Act and although they may have done things which there was no jurisdiction to do, they have acted in good faith and in a reasonable manner.

These words apply to sect. 16 of the Act of 1930 just as much as to the Act of 1890, and if the learned judge is justified on the evidence in coming to the conclusion that the defendants' agents and servants were acting pursuant to the statute—in the sense that they sent the ambulance to take charge of this old man, Mr. Frost, at his own home on the grounds that they considered he was a suitable person to be detained—leave ought to be granted to the respondent to bring an action under sect. 16. Subsect. (1) (i) enacts :

Where a person has presented a petition for a reception order, or signed or carried out, or done any act with a view to signing or carrying out, an order purporting to be a reception order or any report, application, recommendation, or certificate purporting to be a report, application, recommendation, or certificate under this Act, or any Act amending this Act, . . . he shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground unless he has acted in bad faith or without reasonable care.

The question arises here as to whether on the evidence the learned judge could come to the conclusion that the act of taking the applicant in the ambulance to the hospital was an act done pursuant to the Act of 1930. If they took him because they thought they were entitled to do so under that Act, as a lunatic, they would be purporting to act under the statute although they had not really the power to do so. Looking at the evidence, and without going into detail, I refer to the appellants' letter of Oct. 4, in which they say, among other things :

Your client was admitted to the institution on Aug. 25 at the request of Dr. Dean, supported by the certificate, a copy of which is enclosed.

I think it is impossible to suppose that that means more than this—the officers of the corporation thought they were dealing with somebody whom they were not entitled to take unless there was a certificate, and they regarded the letter of Dr. Dean, who was the medical attendant of the respondent, as a certificate and referred to it as such. Its weight has been somewhat displaced by other acts, and the corporation acted in this way because they thought that they were taking possession of a man of unsound mind which they thought they were entitled to do by reason of the certificate, which would not in fact entitle them to

take him from his own home to the hospital. The certificate read as follows :

Please receive into hospital Robert John Frost of 11 Warriker Street, aged about 75 years. He requires hospital treatment. Requires to be kept under observation.

I think that meant that whilst he was undergoing the medical treatment he should also be observed to see if by his conduct whilst he was there, and by the observation of the officials he might be deemed to be a lunatic. And that was a very proper letter for Dr. Dean to have written with regard to a person who was to be taken away as a pauper and to be treated as a patient upon whose condition observation should be kept to see if he was a person who was suitable to be treated in the mental ward. But the appellants' officials seem to have treated that document as if it entitled them to take Frost without his consent, to put him into an ambulance—to remove, or at least to convey, him to the hospital and to put him into a mental ward, as though he were a lunatic, under the Act.

If that is right, then the case is certainly brought within the section to which I have referred, that is sect. 16 of the Act of 1930. Subsect. (2) reads :

No proceedings, civil or criminal, shall be brought against any person in any, court in respect of any such matter as is mentioned in the last preceding subsection without the leave of the High Court, and leave shall not be given unless the court is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care.

There is no question here of bad faith, and it is only one of reasonable care. In my judgment there was sufficient evidence to justify the learned judge to conclude that in acting only upon this letter of Dr. Dean and in failing to get any medical man or expert to examine Frost before they took him into the ward, there were substantial grounds for the contention, as we hold, subject to the present facts being displaced by other evidence hereafter, that the appellants *did* act without reasonable care. The evidence before the learned judge was in the form of affidavits and correspondence, and a consideration of that evidence has satisfied me that a case was made out upon the hearing of the summons that the appellants by their servants acted without reasonable care at any rate during the first period, that is to say, from the time of the taking away in the ambulance on Aug. 25 until the certificate of Dr. Todd. For the negligence, if it were negligence, of Dr. Todd in giving that certificate they are not, under the circumstances, responsible, having regard to the *Liverpool* case (2). They are responsible in that, in view of the unsatisfactory certificate, their officials were acting without reasonable care when they detained him in the mental ward and did not have him examined during those four days. For that reason I think leave was

rightly given as from Aug. 25 until the expiration of the four days, when he was released. The leave to bring the action should not extend to any action for damages with regard to the last period. This is important from the point of view of the respondent, because in fact he was probably better situated during those ten days, and if there was any real damage it was in being forced into the ambulance and put into the mental ward.

I should like to say that we are only dealing with the evidence before us with regard to the occasion between Aug. 25 and the expiration of the four days, and it may be that the appellants will be able at the trial to satisfy the tribunal that any proceedings before Frost was actually put into the mental ward were quite independent of any detention as a person of unsound mind. Any judgment we give is with regard only to the period Aug. 25 to the expiration of the four days and that will not preclude them from showing, if they can, that such acts were not purported to be done under the Act. The appeal must be dismissed, and it is not necessary for me to add any terms to the effect that the leave must only apply to the period I have indicated because the former order does not say what the particular dates are to be, but it must be clearly understood that the leave only applies to the period up to the expiration of the four days in the mental ward.

For these reasons the appeal is dismissed with costs. If it turns out that any part of the proceedings were not such as to which sect. 16 would apply, then the appellants will be entitled to defend under the Public Authorities Protection Act, and with that in mind it will be desirable to consider carefully whether sect. 16 does apply or not.

GREENE, L.J. : I agree. With regard to the nature of the jurisdiction under sect. 16 it is sufficient for me to say that in my opinion the learned judge was entitled, on the evidence before him, to find that there were substantial grounds for the contention that the corporation acted without reasonable care with regard to that period to which my Lord has referred. The evidence is incomplete, but it is sufficient for the purposes of sect. 16 to satisfy the court to have so found. I will say no more with regard to the facts of this case, upon which there may be a very different complexion at the trial. The case at present is *prima facie* one of absence of reasonable care.

It may be in cases where complaint is made of certain treatment that the complainant may suffer some injustice because he may not be in a position to know the full facts, so that it may be on the one hand sect. 16 may apply or on the other that it may not, and he does not know. He cannot know all that has happened with regard to the actions of the proposed defendants and therefore he is in this dilemma : That he may make an application under sect. 16 and be dismissed, because it does not apply at all, or he may take a chance that it is not under the section, and then it turns out that it is. I take it that when it is not possible to say

whether sect. 16 applies or not, but when the section is at least satisfied with regard to the evidence required, the proper order is one which should preserve the right of the defendants to rely on the Public Authorities Protection Act, which actually gives them more protection than sect. 16, if at the trial it appears that they were matters not requiring leave under sect. 16. We confirm the learned judge, subject to that right to rely on the Public Authorities Protection Act if sect. 16 has no application.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Alexander Pickard*, Town Clerk, Hull (for the appellants) ; *Stevenson & Couldwell*, agents for *Iveson, West & Wilkinson*, Hull (for the respondent).

[Reported by CHARLES E. EDEN, ESQ., Barrister-at-Law.]

BLEWETT v. BLEWETT.

[COURT OF APPEAL (Lord Wright, M.R., Slesser and Romer, L.JJ.),
April 29, 1936.]

Landlord and Tenant—Lease—Lease vested in co-owners—Covenant to repair—Notice to repair served on one lessee only—Notice requiring work not within covenant—Vesting of lease in Public Trustee—Law of Property Act, 1925 (c. 20), s. 146, Sched. I, Part IV, para. 1 (4).

In 1877 a lease of two cottages was granted to the defendant's father to take effect on the death of the plaintiff's father. On the death of the defendant's father intestate in 1898, the lease vested in his wife and upon her death in 1915 it vested by her will in the five children. The plaintiff's father died in 1926. By a family arrangement, the defendant was allowed to live rent free in one of the cottages on condition that he kept both cottages in repair. In 1934 the plaintiff served a notice upon the defendant's brother, who was one of the lessees and who managed the family affairs, requiring him to do certain repairs under a covenant in the lease. No repairs were done and the plaintiff brought an action for possession. The county court judge found that some of the work required to be done was not repair work within the covenant and that other work was of a more expensive character than the covenant required, and he held that the notice was therefore not a good notice within the Law of Property Act, 1925, s. 146, and he gave judgment for the defendant. The plaintiff appealed :—

HELD : (i) the notice was not bad merely because it included work which the plaintiff was not entitled to require to be done under the lease.

(ii) the notice was bad because it was not served on all the lessees and the appeal ought to be dismissed.

SEMBLE : the lease vested in the Public Trustee by virtue of the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (4), and notice ought to have been served on the Public Trustee.

[EDITORIAL NOTE. The point of interest here is the one just briefly touched upon by LORD WRIGHT, M.R., in his judgment, that in the cases of leaseholds held in undivided shares falling within the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (4), a notice under the Law of Property Act, 1925, s. 146, ought to be served upon the Public Trustee. There seems no evidence in this case as to whether the Public Trustee had been requested to act or not in the trusts of the property. The

words "joint lessees" are used a good deal in this case, but there is no doubt the lessees were, in fact, tenants in common.

AS TO NOTICES UNDER LAW OF PROPERTY ACT, 1925, s. 146, see HALSBURY, Hailsham Edn., Vol. 20, pp. 258-260, paras. 291, 292; and FOR THE CASES, see DIGEST, Vol. 31, pp. 452, 453, Nos. 5994-6001.]

Cases referred to :—

- (1) *Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496; 31 Digest 486, 6339.
- (2) *Fox v. Jolly*, [1916] 1 A.C. 1; 31 Digest 485, 6338.
- (3) *Guillemard v. Silverthorne* (1908), 99 L.T. 584, N.P.; 31 Digest 486, 6341.
- (4) *Chapman v. Knight* (1880), 5 C.P.D. 308; 13 Digest 530, 812.

APPEAL from a decision of His Honour JUDGE LIAS, given in the county court at Redruth on Jan. 9, 1936.

In January, 1877, a lease of two cottages in Church Row, Lanner, was granted to one William Blewett, to take effect upon the death of one J. H. Blewett. William Blewett died intestate in 1898, and letters of administration were taken out by his widow. The widow died in 1915, and by her will the lease passed to five children. J. H. Blewett died in 1926. By a family arrangement J. T. Blewett, one of the five children of William Blewett, was allowed to live rent free in one of the cottages on condition that he kept both cottages in repair. In October, 1934, Edith Blewett, who was then the owner of the cottages, served a notice upon W. N. Blewett, a brother of J. T. Blewett and one of the lessees, who managed the family affairs, requiring him to do certain repairs under a covenant in the lease. No repairs were done, and the plaintiff brought an action against J. T. Blewett for possession. The county court judge found that a great deal of the work required by Edith Blewett to be done was not repair work within the covenant in the lease, and that a great deal of it was new work which she had no right to demand, and that the work she had a right to demand was of a more expensive character than the covenant required. The county court judge held that the notice was therefore not a good notice within the Law of Property Act, 1925, s. 146, and he gave judgment for J. T. Blewett. Edith Blewett appealed.

H. Wynn Parry, K.C., for the appellant.

The respondent was not represented in the Court of Appeal.

LORD WRIGHT, M.R. : We have been so interested in your argument, Mr. Parry, that I am afraid we have spun it out too long, but the upshot seems to be this. The learned judge has given judgment for the plaintiff on grounds which do not appear to me to be correct. He has not given effect to the law as laid down in *Pannell v. City of London Brewery Co.* (1), which was approved by the House of Lords in *Fox v. Jolly* (2), at p. 15. It appears to me that that case is indistinguishable from the present case on the point upon which the learned judge has proceeded. I have also to add that *Guillemard and Another v. Silverthorne* (3) does not seem

to me to be in point at all ; it is quite a different matter, as Mr. Parry pointed out at the outset of his argument.

So far the appeal succeeds, but on the face of the proceedings there appears an insuperable difficulty in the way of the appellant here ; that is, at the very threshold of the case she has to prove that she served a notice under the Law of Property Act, 1925, s. 146. The plaintiff here is claiming forfeiture on the ground that a notice was served under sect. 146 and was not complied with, but when you read sect. 146, it is perfectly clear that the notice must be served on the lessee or the lessees, and it is equally clear on the facts that the notice was only served on William Blewett. That is the express finding of the learned judge, and that is the only notice which has been produced. William Blewett is no doubt one of the lessees, but there is no evidence that service on him was good service on the other lessees, because the finding of the learned judge is, that there were five joint lessees on the devolution of title which the learned judge finds there, that the lease vested in the widow of the original William Blewett on her death by will passed to five children who were joint lessees and had joint rights in the tenancy. There is no suggestion at all that the notice under sect. 146 was ever served on any of them other than William Blewett. It appears also under the Law of Property Act, 1925, Sched. 1, Part IV, para. 1 (4), that in a case like this where an interest is held in undivided shares by more than four people the entirety of the interest is to vest in the Public Trustee. Therefore it seems that the notice ought to have been served on the Public Trustee ; whether that is so or not, it does not appear to have been done. It must at least be served on all of the lessees who were jointly interested. That is an objection to allowing this appeal, and it is a ground which the learned judge upheld. It is a pure matter of law arising on facts which are not in dispute, which appear on the face of the judgment and such documents as there are—I say such documents as there are because we have not seen the will under which the lease is said to have vested in those five children. Therefore, I think it is the duty of the court, having cognisance of these facts to apply the law so as to uphold the judgment of the learned judge. As an authority for that, I may refer to *Chapman v. Knight* (4), where the rule is laid down that a judgment can be upheld on another ground than that upon which it is based by the county court judge. I think that is the true view, assuming, of course, that the facts or the documents on which the new point arises were properly proved or established before the county court judge. That being so, the result seems to follow that this appeal must be dismissed.

Solicitors : A. J. Adams & Adams, agents for Coulter Hancock & Thrall, Truro (for the appellant).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

HITCHINS AND ANOTHER v. BRITISH COAL REFINING PROCESSES, LTD.

[KING'S BENCH DIVISION (Talbot and Macnaghten, JJ.), **March 23,
24, 25, April 7, 1936.**]

*Arbitration—Error on face of award—Application to set aside—Reference to
pleadings in award—Incorporation in award.*

By an agreement the applicants were to act as consulting engineers in connection with a certain coal refining process owned by the respondents. While the plant for the working of the process was being erected, a dispute arose, the respondents wanting the applicants to attend every day at the site of the plant and the applicants considering this to be no part of their duty. The respondents thereupon terminated the agreement and the matter was referred to arbitration. The applicants pleaded that the termination of the agreement was unjustified; the respondents pleaded that the applicants should have attended every day and that they had been guilty of negligence in respect of certain matters set out in the counterclaim. The arbitrator found the termination of the agreement to be unjustified and also negligence on the part of the appellants in respect of the matters set out in the counterclaim, and he awarded the appellants damages after setting off an unspecified amount for damages for negligence. The respondents moved to set aside the award on the ground of error of law apparent on the face of it. At the hearing the respondents contended that the whole of the pleadings in the arbitration were admissible. The respondents contended that for the purpose of deciding whether there was an error of law apparent on the face of the award, the court could not look at any document except the award itself. The respondents further contended that the arbitrator had committed an error in law in deciding that the negligence found did not afford sufficient ground for the termination of the agreement, and further that on the true consideration of the agreement, the refusal to attend daily was as a matter of law a sufficient ground for the termination of the agreement:—

HELD : (i) inasmuch as the arbitrator in his award referred to certain paragraphs in the counterclaim, such paragraphs ought, in considering whether there was an error on the face of the award, to be regarded as forming part of the award.

(ii) whether misconduct justifies dismissal is a question of fact, and the arbitrator's decision was final.

(iii) the right to terminate the agreement because the applicants refused to attend daily was a question specifically submitted to the arbitrator and the court could not interfere with his decision, even if the question was a question of law.

[EDITORIAL NOTE.] This case determines a point left open in the case of *Absalom v. Great Western (London) Garden Village Society, Ltd.* (1) and decides that where there are pleadings in an arbitration and they are specifically referred to in the award so that it cannot be fully understood without reference to them, they are incorporated therein. They must, therefore, be included in the consideration whether there is any error apparent on the face of the award.

AS TO SETTING ASIDE AN AWARD ON THIS GROUND, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 680, 681, para. 1133; and FOR CASES, see DIGEST, Vol. 2, pp. 521-531, Nos. 1589-1675.]

Cases referred to :

- (1) *Absalom (F. R.), Ltd. v. Great Western (London) Garden Village Society, Ltd.*, [1933] A.C. 592 ; Digest Supp.
- (2) *Morgan v. Savin* (1867), 16 L.T. 457 ; 34 Digest 70, 471.
- (3) *Harmer v. Cornelius* (1858), 5 C.B.N.S. 236 ; 34 Digest 72, 487.
- (4) *Baster v. London & County Printing Works*, [1899] 1 Q.B. 901 ; 34 Digest 79, 563.
- (5) *Re King & Duveen*, [1913] 2 K.B. 32 ; 2 Digest 528, 1647.

APPEAL from the award of an arbitrator under the Arbitration Act 1889.

The applicants were a firm of consulting engineers ; the respondents a firm of coal refiners. By an agreement dated Sep. 14, 1933, it was agreed between the parties that the applicants should act as consulting engineers in connection with a certain coal refining process in which the respondents owned the sole rights. A dispute arose : the respondents considered that the applicants should attend every day at the site where the plant for working the refining process was being erected, and the applicants considered that this was no part of their duties. The respondents terminated the agreement in Mar., 1934, and the dispute was submitted to an arbitrator under the arbitration clause in the agreement. The applicants claimed that the termination of the agreement was unjustified ; the respondents answered that it was the applicants' duty to attend every day and they had refused to do so ; and that the applicants had been guilty of negligence, for which they counterclaimed damages. The arbitrator found (1) that the agreement had been terminated on insufficient grounds, (2) that the applicants had been negligent as alleged in certain specified paragraphs of the counterclaim. He awarded damages to the applicants, being the amount due to them on their claim less the amount of the damages due from them to the respondents on the counterclaim.

The respondents moved to set aside the award, alleging an error in law apparent on the face of it.

The arguments sufficiently appear in the considered judgment of the court delivered by MACNAGHTEN, J.

R. P. Croom-Johnson, K.C., and *J. P. Ashworth* for the British Coal Refining Processes Ltd., who were the appellants in the appeal and the respondents in the arbitration.

D. N. Pritt, K.C., and *Gilbert Paull* for Col. Hitchins and Col. Lockhart-Jervis, the respondents in the appeal and the applicants in the arbitration.

TALBOT, J. : In this case my learned brother has been good enough to prepare the judgment, and he will be kind enough to read it. I have had the advantage of reading and considering his judgment and discussing it with him, and I agree with his judgment, and have nothing to add.

MACNAGHTEN, J.: By an agreement dated Sept. 14, 1933, made between the respondents, the British Coal Refining Processes, Ltd., of the one part and the applicants, Col. Charles Faunce Hitchins and Col. Beresford Clayton Lockhart-Jervis (carrying on business in co-partnership under the style of Hitchins, Jervis & Partners) of the other part, after reciting that the respondents owned the sole rights in the Salerni coal refining process in the United Kingdom of Great Britain and Northern Ireland and in the Irish Free State, the respondents engaged the applicants to act as consulting engineers in connection with that process on the terms set out in the agreement. The engagement was by the agreement to continue until Mar. 31, 1939, but within six months from its commencement a dispute arose between the parties. The respondents wanted the applicants to attend daily at the site where the plant for working the Salerni process was in course of erection. The applicants, on the other hand, considered that it was no part of their duties as consulting engineers to attend every day at the site and they refused to do so. Thereupon the respondents terminated the agreement in March, 1934. The agreement contained an arbitration clause, and the matter was accordingly referred to arbitration.

In the arbitration, pleadings were delivered. The applicants claimed damages for the termination of the agreement, which, as they alleged, was unjustified. The respondents justified the termination of the agreement on the ground that it was the duty of the applicants to attend at the site every day and they had refused to do so, and also on the ground that the applicants had been guilty of negligence; and they counterclaimed for damages by way of compensation for the losses which, as they alleged, they had sustained by reason of such negligence. The arbitrator, by his award dated Dec. 21, 1935, decided that the grounds on which the respondents had terminated the agreement were insufficient and that the applicants were entitled to damages in respect of their claim. He also decided that the applicants had been guilty of negligence in respect of certain matters alleged in the counterclaim, and that the respondents were entitled to damages in respect of those matters. The arbitrator did not state the amounts which he awarded to the applicants and the respondents respectively in respect of the claim and the counterclaim: he merely awarded to the applicants the sum of £1,316 17s. 0d. as the amount due to them in respect of their claim after deduction of the unspecified amount of the damages awarded in respect of the counterclaim. In these circumstances the respondents now move the court to set aside the award on the ground of error in law apparent on the face of it.

On the hearing of the motion the question was raised as to the admissibility in evidence of any document except the award itself. Mr. Croom-Johnson, for the respondents, maintained that the whole of the

pleadings delivered by the parties in the arbitration were admissible—namely (1) the points of claim, (2) the points of defence and counterclaim, and (3) the reply ; while Mr. Pritt, for the applicants, argued that none of the pleadings was admissible and that, for the purpose of deciding whether there was any error of law apparent on the face of the award, the court could not look at any document except the award itself.

If the contention put forward by Mr. Pritt be well founded, it is plain that the application to set aside the award must fail, because it is not possible to find any proposition of law of any sort in the award itself. In the case of *F. R. Absalom, Ltd. v. Great Western (London) Village Society, Ltd.* (1), there was a motion to set aside an award for error in law apparent on the face of it, and in that case, as in this, the disputes between the parties were formulated in pleadings delivered in the arbitration. In that case LORD WARRINGTON (at p. 598) considered that the court was at liberty to look at the pleadings solely for the purpose of ascertaining whether any specific question of law was in dispute, and LORD WRIGHT, on the other hand, was of opinion (at p. 613) that, since the pleadings were not referred to in the award, they could not in strictness be considered and the court could only look at the award itself and at any document incorporated by the arbitrator with his award. Since by his award the arbitrator here has found that the applicants were guilty of negligence “as mentioned” in certain paragraphs of the counterclaim—those paragraphs ought, I think, to be regarded as incorporated with and forming part of the award, and to that extent at least the contention put forward on behalf of the respondents is correct. The arbitrator, though he found that the applicants had been guilty of negligence as alleged in those paragraphs, decided that the negligence therein alleged did not afford sufficient ground for the termination of the agreement, and Mr. Croom-Johnson boldly argued that the arbitrator had in that respect committed an error in law, because, as he maintained, as a matter of law the negligence of the applicants justified the respondents in terminating the agreement. He relied for this argument on the case of *Morgan v. Savin* (2), and the decision of the Court of Common Pleas in *Harmer v. Cornelius* (3). But, as was pointed out by CHANNELL, J., in *Baster v. London & County Printing Works* (4), it is impossible to give an exhaustive definition of what is misconduct which justifies dismissal, because, as the learned judge said : “The question is one of fact and degree in all cases.” In the present case it was for the arbitrator to decide whether the negligence of the applicants was negligence such as to justify the respondents in terminating the agreement, and his decision is final and binding on the parties.

Then it was said that there was another error in law apparent on the face of the award. It appeared from the pleadings that the respondents had terminated the agreement because the applicants refused to attend

daily at the site where the plant was being erected, and that they had not put forward negligence as a justification for this action until after the commencement of the arbitration. The arbitrator, by the first paragraph of his award, stated "that the grounds on which the said agreement was determined by the respondents were insufficient," and Mr. Croom-Johnson argued that the word "grounds" in that paragraph meant the grounds which the respondents had, in the first instance, put forward—namely, the refusal of the applicants to attend daily at the site; and that the word "insufficient" meant "insufficient in law"; and that, on the true consideration of the agreement, the refusal to attend daily was as a matter of law a sufficient ground for the termination of the agreement; and that, therefore, there was error in law apparent on the face of the award.

There is, in my opinion, a conclusive answer to this contention. If it be permissible to look at the whole of the pleadings delivered in the arbitration, it appears therein that the respondents affirmed and the applicants denied that the respondents were entitled to terminate the agreement because the applicants refused to attend daily at the site, and that this was a specific question submitted to the decision of the arbitrator. If that question was (as the respondents contend) a question of law, then the well-established rule that the court cannot interfere with the decision of an arbitrator where a specific question of law has been submitted to him applies, and the parties are bound by his decision whether it be right or wrong in law: *Re King & Duveen* (5). In my opinion the application of the respondents fails, and the motion to set aside the award must be dismissed with costs.

Solicitors: *Slaughter & May* (for the appellants); *W. Wallace Harden* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

DIAMANTIDI v. GROSVENOR SECURITIES, LIMITED AND THE GUILDHALL TRUST, LIMITED.

[KING'S BENCH DIVISION (Macnaghten, J.), **May 5, 6, 1936.**]

Companies—Sale of shares—Condition of solvency—Ascertainment of solvency.

Upon a sale of 50,000 shares in a limited company it was agreed that the sale should be subject to an accountant appointed by the purchasers being "satisfied that the financial position of" the vendor company was "solvent":—

HELD: the condition that the company should be "solvent" did not require the accountant to value the assets of the company, but merely required him to be satisfied that it was in a position to pay its debts.

[EDITORIAL NOTE.] The question here is the meaning of the word "solvent" and what inquiries an accountant should make to satisfy himself that a company is solvent at any particular time. It is said that such an inquiry could not in the ordinary way extend to a valuation of all the assets of the company, particularly where the assets consisted of real and leasehold property in London, which is well known to vary in value from time to time. The correct inquiry is to take a broad view of the business position of the company and to ascertain whether it is in a position to pay its debts.

AS TO SOLVENCY, COMPARE THE STATUTORY DECLARATION OF SOLVENCY: HALSBURY, Hailsham Edn., Vol. 5, p. 757, para. 1285.]

ACTION for the recovery of £3,625, being the deposit payable under an agreement between the plaintiff and the first-named defendants for the purchase by the defendants of 50,000 shares in the Real Estate Debenture Corporation, Ltd. The agreement in question provided that an accountant, to be appointed by the purchasers, should be given facilities to investigate the affairs of the corporation. Originally the payment of the deposit was to be made before the matter was submitted to the accountant. This requirement was, however, waived at the request of the Grosvenor Securities on the second defendants, the Guildhall Trust, guaranteeing the due performance of the agreement. The solicitor of the defendants duly requested a firm of accountants, Messrs. Milne, Gregg & Turnbull, to make the investigation. The plaintiff supplied them with various documents relating to the corporation, but they were not informed that the agreement was to be subject to the accountant being satisfied that the corporation was solvent. They made their report on Dec. 20, 1935, but did not deal specifically with the question of solvency. On Dec. 21 the defendants' solicitor by telephone gave them particulars of the clause in question, and on Dec. 23 they wrote: "With further reference to our report dated 20th inst., and our letter of the same date, we beg to inform you that we are not satisfied the company is solvent." The defendants thereupon claimed the right to terminate the agreement. Mr. Gregg in his evidence stated that the meaning he attached to the word "solvent" in his report was that if a company realises all its

assets in the open market, in the ordinary course of business, and the proceeds are not sufficient to meet its liabilities, the company is not solvent.

W. N. Stable, K.C., and *H. Malone*, for the defendants : It is conceded that the onus is on the defendants. It is proved that the investigation made by Mr. Gregg was that contemplated by clause 9 of the agreement. The court cannot inquire into the sufficiency of the investigation. The parties contracted that the agreement should be deemed to be subject to the accountant being satisfied. It is not for the court to decide whether he did his work well or ill or ought not to have been satisfied. The contract is made conditional on the fact that the accountant be satisfied. Only *mala fides* can set his opinion aside. If he makes an honest investigation, it is not for the court to decide if it was adequate or not. If it was a matter for the court to determine, the court should say it is not satisfied the corporation was solvent in the sense in which it was used in the agreement.

H. St. John Field, K.C., and *Walter Gumbel* for the plaintiff : Solvency means capacity to pay one's debts when they become due. The accountants have not denied that the company was able to do this. Sale of Goods Act, s. 62 (3) states : " A person is deemed to be insolvent who has ceased to pay his debts or cannot pay his debts as they become due ". What has to be considered is whether the company could be wound up (Companies Act, 1929, s. 168.)

MACNAGHTEN, J. : In this action the plaintiff, Mr. Anthony Nicholas Diamantidi, sues the Grosvenor Securities, Ltd., and the Guildhall Trust, Ltd., to recover £3,625 as money due and payable to him by the first-named defendants under an agreement dated Nov. 20, 1935, made between him and the first-named defendants, and as against the second-named defendants as guarantors of the liability of the first-named defendants under that agreement. The agreement in question was an agreement for the sale by the plaintiff to the first-named defendants of 50,000 shares in the capital of a company called the Real Estate Debenture Corporation, Ltd., at the price of 12s. 6d. per share, that is to say, for the sum of £31,250.

The Real Estate Debenture Corporation, Ltd., was a public company incorporated under the Companies Act, 1929, in 1934. It was a company which was formed for the purpose of holding various properties situated in the metropolitan area which had been acquired originally by the plaintiff in the action. The authorised capital of the company was £200,000, divided into 200,000 shares of £1 each, of which 90,000 only had been issued. The plaintiff was the holder of a number of shares exceeding 50,000 in that company, and the contract provided for the sale of 50,000 of his shares. The contract is dated Nov. 20, 1935. No deposit was paid on the signing of the agreement on Nov. 20, but it was

provided by clause 2 of the agreement that there should be a deposit of £3,625, the sum which is sued for in this action, and that that sum should be paid to the plaintiff by the first-named defendants on or before Dec. 10, and that the balance of the purchase price should be paid on or before Jan. 21, 1936, or alternatively, at the option of the first-named defendants, by instalments of £20,000 on Jan. 21, 1936, and the balance on or before Mar. 21, 1936. There was a provision that upon payment of the deposit the certificate or certificates for the 50,000 shares should be deposited with the trustee, and there was a further provision with regard to putting the shares the subject of the agreement and the other shares belonging to the plaintiff into a pool for a limited period.

After the payment of the deposit the directorate of the company was to be changed, the then directors other than the plaintiff himself were to resign and the resigning directors were to be replaced by one nominee of the first-named defendants and the gentleman who had been selected as trustee of the share certificates, and that the trustee should be the chairman of the board. Clause 8 of the agreement provided that the plaintiff should, upon payment of the deposit, apply for the permission of the committee of the London Stock Exchange for dealing in shares of the Real Estate Debenture Corporation, Ltd., and that if for any reason other than the wilful default of the purchasers the permission should not be obtained within one month of the date of such application, the deposit should be forthwith returned to the purchasers and the agreement should become null and void.

Clause 9 of the agreement, which is the clause upon which the dispute in this action depends, provided as follows :

The vendor shall, as far as the permission for dealings mentioned in clause 8 had been obtained, authorise the purchasers' accountant to investigate the affairs of the Real Estate Debenture Corporation, Ltd., and this agreement shall be deemed to be subject to such accountant being satisfied that the financial position of the Real Estate Debenture Corporation, Ltd., is solvent, and such as has been represented to the purchasers by the vendor as to income and expenditure as set out in the schedules attached hereto and prepared by the accountants of the Real Estate Debenture Corporation, Ltd.

The original agreement has been put in evidence. There were no schedules actually attached to the agreement, but it was the fact that the accountants of the Real Estate Debenture Corporation, Ltd., had prepared schedules of the property belonging to that company, and there is no dispute that the document which has been put in evidence and the exhibit D.8 are the schedules which are referred to in clause 9 of the agreement. The schedules contain a complete list of the various properties belonging to the company, the Real Estate Debenture Corporation, Ltd., whom I will hereafter refer to as "the company" for short. It contains a complete schedule of all the properties belonging

to the company, the names of the tenants of such of the property as is let, together with the terms of the letting and the rent payable, and any charges which the tenant had to pay, and also the premises which were not let, and in those cases the rent which was asked for the vacant premises is set out. It contains also a statement of the outgoings in respect of the various properties and a summary of the income and rental values, and it has been referred to in the course of these proceedings as an "estimate." I gather, so far as the properties are concerned, it is not an estimate, it is an actual statement of the terms of the tenancies of those properties which have been let, and so far as the properties are concerned I gather it was a statement of the outgoings which had in fact been paid during the first year of the company's existence. Such was the agreement that the plaintiff and the first-named defendants entered into. Mr. Erskine, who is I think a director of Grosvenor Securities, Ltd., communicated with the plaintiff, and the plaintiff was apparently willing that the affairs of the Real Estate Debenture Corporation, Ltd., should be investigated by the accountant of the first-named defendants. Accordingly on Thursday, Dec. 19, Mr. Erskine rang up the accountant of the Grosvenor Securities, Ltd., a Mr. Gregg. Mr. Erskine apparently is interested in a large number of property companies, and Mr. Gregg was accountant, I gather, to all those companies. He was, anyhow, the accountant of the Grosvenor Securities, Ltd. Mr. Erskine rang him up and said he wanted a report upon the affairs of the Real Estate Debenture Corporation, Ltd., and told him that he would get the documents required from the plaintiff.

Was Mr. Gregg satisfied that the financial position of the Real Estate Debenture Corporation, Ltd., was solvent? The financial position of the Real Estate Debenture Corporation, Ltd., I do not suppose means anything more than: Was the corporation solvent? Whatever may be said about the word "solvency," it at any rate must relate to the financial position and therefore "financial position" so far as the word "solvent" is concerned is unnecessary. Was Mr. Gregg satisfied that the corporation was solvent? In his letter of Dec. 23, he says he was not satisfied, and as I have already pointed out, if the word "solvent" in clause 9 of the agreement means what Mr. Gregg thought it meant, I do not see how he or anybody else could ever be satisfied. He could only be satisfied by trying the experiment and winding up the company. Then so long as the company was carrying on the business which it was formed to carry on, namely, that of a private owning company, certainly unless the margin was a very very large one, it would be a very rash person who would say he was satisfied that in the supposed event of the company being liquidated the realisation of the property would amount to a sum in excess of the total liabilities.

In my view Mr. Gregg entirely misunderstood the matter which was

entrusted to him. It is most unfortunate that Mr. Erskine did not put his instructions into writing. Human memory, especially with regard to telephone conversations, is always liable to err. Mr. Gregg made no note of the instructions he received. He was to give a report about solvency, and he took it to be a report about solvency in the event of the liquidation of the company. I cannot help thinking that there may have been something said over the telephone which has been mis-remembered by Mr. Erskine and Mr. Gregg. Indeed, I cannot think that he could have formed his opinion on the basis on which he says he formed it unless something had been said in addition to or different from that which was remembered. Mr. Erskine's recollection is that all he did was that he read the clause to Mr. Gregg. But whether the instructions given to Mr. Gregg, whether the clause was read to him, whether it was read correctly to him, whether he understood it when it was read to him or not, really is a matter of no importance and no relevance in the decision of the case, because it is agreed that the question as to the meaning of the clause is a question for the determination of the judge, and with the assistance of counsel I have to form my opinion as to what this clause does mean. That it should impose upon the accountant of the company an obligation to value the company's property seems to me a most extravagant proposition. If it was a question of valuing the property a valuer would be the person who would be naturally employed, unless indeed the parties took the view which some people take that all valuations, especially all valuations of property in the metropolitan area are really of very little value, or are not of great value, that the fluctuations of the value of house and shop property in the metropolis are such that what is worth £1 to-day may be worth £2 in a very short time, or worth only 5s., and that the question of what the property would realise in Dec., 1935, would be of very little assistance for the purpose of forming an opinion as to the prospects of a company which was not going to sell any of the properties but was going to hold them. The fact therefore that the question was going to be referred to the accountant appears to me to exclude the idea that valuation was the object which the parties had in view and that they were requiring that the accountant should be satisfied with regard to values. I think that the word "solvent" here has the much more ordinary meaning of being able to pay its debts. A person is solvent who can pay his debts. A person is insolvent who cannot pay his debts. The declaration which was given by Mr. Cole was :

Solvency is that condition where the existing and probable assets are sufficient to meet the actual and contingent liabilities.

That is a matter on which an accountant, looking at the accounts of the company and making so far as it was necessary to make, any inquiry

about matters which did not appear sufficiently in the books, can express an opinion, and can express an opinion with confidence, if the opinion is with regard to the condition of affairs at the time when the opinion is expressed. That is what the accountant under this clause was required to do.

This agreement shall be deemed to be subject to such accountant being satisfied that the financial position of the Real Estate Debenture Corporation, Ltd., is solvent.

When Mr. Gregg gave evidence he said quite truly and frankly that of course he had no doubt that in Dec., 1935, the company was solvent. The misapprehension he was under with regard to the purposes of his report brings that matter out very clearly. He thought that he was being asked to advise as to whether it was a good bargain that his client had entered into, to report upon the bargain, and he naturally has had the figures before him and the account prepared by Messrs. Murray and the report and the balance sheet, and the original prospectus. Of course, so far as Messrs. Murray's figures are concerned, and so far as the figures certified by Messrs. Price, Waterhouse & Co., the auditors of the company, are concerned, he accepts those figures as being correct, although, of course, he has not had any opportunity of actually seeing the vouchers himself. He concludes his report in this way :

On the basis of the information submitted therefore annual profits appear to be accruing at the present time at the rate of £5,082 per annum.

There is no question of insolvency, the only question is of the extent of the profits. A dividend of 5 per cent. on the issued £90,000 share capital amounts to £4,500, "but it should be borne in mind that the prospects of the company are naturally dependent on the present rentals being fully maintained and additional income being obtainable from properties at present void." If I may say so, that is an obvious observation. The position that the company would continue to make a profit at the rate of £5,000 a year, of course, depended upon their rentals continuing and being maintained : but that was a matter on which the accountant did not profess to be able to express any opinion. All he could say was that on the figures before him they were making an annual profit of so much a year.

That being the position, it is perfectly obvious that the company is solvent, that is to say it is solvent on Dec. 20, 1935. Of course, if all the tenants were made bankrupt and the property could not be let, if bombs were dropped on the properties and they were destroyed, a different set of circumstances would arise ; but on the information before Mr. Gregg, and it was the only information that was available, the company was not only solvent but it was a profit-making company. It is true that Mr. Cole, who was called as a witness for the defendants, was satisfied that on the basis of the balance sheet as at Mar. 31, 1935,

certified by Messrs. Price, Waterhouse & Co., the company was solvent, but he said that he would not like to express an opinion as to the condition of affairs on Dec. 20, 1935, without having a balance sheet drawn up to that date. That is what I understood him to say. I do not think that that really alters the position. I do not think it would be a reasonable thing for Mr. Gregg to say: "The company was on Mar. 31, 1935, obviously solvent, it had got on the liability side nearly £90,000 of paid-up capital, which would constitute a reserve so far as creditors were concerned"—it would not be reasonable for him to say: "I have not asked and therefore I do not know whether there has been any change in the capital position since March, and therefore I refuse to say that I am satisfied that the company is solvent on Dec. 20." He had the advantage of an interview with the plaintiff. If that was the matter which was in his mind—and of course it was not, because at that time he did not realise that this question was being put to him—but if he had realised and had refrained from asking the plaintiff whether there had been any change in the position, it is conceivable that some of these properties were leasehold, and it was conceivable that the leases had been forfeited, it was conceivable that the property had been burned down when uninsured. It is conceivable, but I do not think that the accountant to the first-named defendants would have been acting reasonably if, without asking for any information and knowing that the company was perfectly solvent on Mar. 30, had said: "Well, I am not satisfied that it is still solvent because I have not chosen to ask as to whether the possibilities which may have altered the capital position entirely since then have or have not happened."

In my view the investigation on Dec. 20 was an investigation under clause 9 of the contract, that the plaintiff did authorise the first-named defendants' accountant to investigate the affairs of the Real Estate Debenture Corporation, Ltd., that Mr. Gregg was the accountant referred to in that clause and that he was in fact satisfied that the financial position of the Real Estate Debenture Corporation, Ltd., was then solvent and was such as had been represented to the purchasers as to the income and expenditure shown in the schedules said to be attached to the contract. I therefore think that the defendants fail to establish the defence which they have set up, and judgment must pass for the plaintiff, for the amount claimed, with costs—against both defendants.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiff); *Erskine & Co.* (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

NEWELL v. CROSS. NEWELL v. COOK. NEWELL v. PLUME.
NEWELL v. CHENERY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, J.J.), **May 12, 1936.**]

Street Traffic—Express carriage—Use of hackney carriage as an express carriage—Sharing of fare by passengers—Owner permitting such use—Road Traffic Act, 1930, (c. 43), ss. 61, 72 (10).

Miss C. engaged a taxi-driver to drive her and six of her friends from Ipswich to Shotley, a distance of ten miles, on the following night, the agreed fare being fourteen shillings. On the following night while the party were leaving Ipswich in the taxicab, the cab was stopped by a police constable and a traffic examiner. In reply to questions, it was stated that the fare was fourteen shillings and that each passenger would contribute two shillings towards this sum. The driver of the taxi stated that he was unaware of this fact and had made no inquiries in this respect. He was not the holder of a public service licence. Miss C. was charged before the justices with unlawfully causing a motor vehicle to be used as an express carriage, there being in force no road service licence with regard to that vehicle, contrary to the Road Traffic Act, 1930 s. 72 (10). The driver was charged with unlawfully permitting the vehicle to be so used. The justices dismissed the charges.

HELD : if it was contemplated or if there was an antecedent contract that the passengers should contribute towards payment of the fare for the hire of a motor-vehicle, there being no road service licence in force as regards that vehicle, there is an offence under s. 72 (10).

[EDITORIAL NOTE.] It will come as a surprise to most that the sharing of a taxi fare among a number of passengers is a criminal offence, but such is clearly the result of the Road Traffic Act, 1930, ss. 61 and 72.

AS TO HACKNEY AND STAGE CARRIAGES, see HALSBURY Supp. to Vol. 27, Street Traffic, para. 611, and FOR THE ROAD TRAFFIC ACT, 1930, s. 61, see HALSBURY COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 654.]

Case referred to :

(1) *Goldsmith v. Deakin* (1933) 98 J.P. 4; Digest Supp.

APPEAL by way of case stated from justices sitting at Ipswich.

On Nov. 25, 1935, Miss Cross, the first respondent, agreed with the driver of a taxicab, the second respondent, that she and six friends should be carried to and from Shotley on the following night at a fare of fourteen shillings. The driver collected the ladies in his taxicab and commenced the journey to Shotley. Whilst still in Ipswich the cab was stopped by a police constable and a traffic examiner. In reply to questions put by the two officials, it was stated that fourteen shillings would be paid for the fare and that two shillings would be contributed by each passenger. There was no road service licence in regard to the vehicle and the driver stated that he did not know Miss Cross before the 25th, that he had no knowledge that she intended to collect or had collected any part of the fare from her friends, that he had made no

inquiries in that respect, and that he had taken no steps to prevent any such action on the part of Miss Cross.

Before the justices it was contended that the passengers had been carried for hire or reward in consideration of separate payments made by them and that, therefore, Miss Cross had caused the taxicab to be used as an express carriage, contrary to sect 72 (10) Road Traffic Act, 1930. The respondent, Miss Cross, contended that in the ordinary course she had hired the cab from a rank, that she had agreed the fare of fourteen shillings, which fare she had paid the driver, and that a licensed omnibus travelling to and from Ipswich and Shotley would not meet her requirements as she and her friends lived at a distance from the terminus.

The justices held that the cab was not being used as an express carriage, that Miss Cross did in fact pay the fourteen shillings to the driver at Shotley, and that she did collect two shillings from each of the other passengers, a fact unknown to the driver. The charge was dismissed.

In regard to Mr. Cook, the driver, it was contended by the appellant that he had permitted the cab to be used as an express carriage and that it was immaterial whether he had actual knowledge of the fact that contributions were made or were to be made towards the payment of the fare. The justices held that he was paid the fare of fourteen shillings at Shotley, that he did not know and had no reason to know or suspect that any part of such fare was or would be collected from the other passengers. They dismissed the charge.

With regard to Mrs. Plume, the third respondent, the cab was booked for the same journey a fortnight before the 26th from Mr. Chenery, the fourth respondent. Mrs. Plume paid Mr. Chenery the fourteen shillings before starting, though her fellow-passengers had paid no contribution. She admitted, however, that she subsequently received such contributions. In reply to the appellant's contention, Mrs. Plume contended that she had not arranged to charge the other passengers any part of the expense and that she did not in fact charge them or receive from them any payment. The justices held that she had in fact paid the fare of fourteen shillings before starting from Ipswich and that no contribution was asked for or received from the other passengers. The charge was dismissed. The facts as regards Mr. Chenery were as in the case of the second respondent. The charge was dismissed.

Valentine Holmes, and *H. P. J. Milmo*, for the appellant: There has been a use of motor vehicles in such circumstances as to make them express carriages, for which a road service licence is necessary. The object of the provision in the Road Traffic Act, 1930, is to protect owners of omnibuses and coaches who had taken out the necessary licences and were bound to maintain services and carry passengers.

None of the respondents appeared.

LORD HEWART, L.C.J.: This is a group of special cases stated by

the justices and arising from prosecutions under the Road Traffic Act, 1930. By sect. 72 (10), it is provided :

If any person uses a vehicle or causes or permits it to be used in contravention of this section . . . he shall be guilty of an offence.

The offences dealt with in the informations in the present cases were offences of causing or permitting a vehicle to be used as an express carriage at a time when there was in force no road service licence permitting it to be so used, and the questions which had to be determined were : (1) in each case, whether the vehicle was so being used ; and (2) if so, whether the respondent was causing or permitting it to be so used. In no case was there a road service licence in force.

The law on the matter is tolerably plain. The Road Traffic Act, 1930, s. 61, divided public motor-vehicles into three classes, of which the second was " express carriages." Express carriages are defined as :

Motor-vehicles carrying passengers for hire or reward at separate fares (none of which is less than one shilling for a single journey or such greater sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying the appropriate fares for the journey or journeys in question.

Subsect. 2 states :

It is hereby declared that where persons are carried in a motor-vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not.

There follows a provision as regards special occasions, but it was never even suggested that this was a special occasion.

The present cases, therefore, raise the question : What is the position, on the one hand, of the passenger, and on the other hand, of the driver or owner of a taxicab in respect of which there is no road service licence, where payment is made by one passenger for the use of the cab, and that passenger collects contributions to the fare from the others ?

The answer to that question manifestly depends on the facts of the particular case. It is easy to point to absurd cases, but the task of marshalling the entire traffic of the country is no easy one and the line has to be drawn somewhere, and, wherever the line is drawn, there will be cases near the line which may appear to cause hardship. If the results appear grotesque that is not a reason why the law should not be enforced, but it may be a reason why the law should be altered.

In the first case, clearly it was in Miss Cross's mind that she should collect, and apparently that she was entitled to collect, fares from her

fellow-passengers. Other considerations apply to the driver, for the justices have found that :

he did not know nor had he any reason to know that any part of such fare was or would be paid by any of the other passengers.

Now, the law relating to that matter is contained in a single paragraph contained in the judgment of AVORY, J., in the oft-cited case of *Goldsmith v. Deakin* (1). He said :

In my opinion, if a person hires out a vehicle in circumstances in which he ought to know that it probably will be or may be used as a stage carriage . . . then he is, within the meaning of the statute, permitting it to be used as a stage carriage.

Here it seems that Miss Cross, unwittingly no doubt, offended against the law, and I cannot see how the justices could find that she was not within the net. The appeal in that case must be allowed, and the case remitted to the justices with the direction to find the offence proved. The penalty is quite another matter. There is, happily, on the statute book, an Act which enables justices in a proper case even to refrain from proceeding to conviction.

As to Mr. Cook's case, I am not prepared to say that the justices came to an erroneous conclusion in finding that Mr. Cook did not know and had no reason to know, and the appeal will be dismissed.

The third case, Mrs. Plume's, is analogous to the first, but on slightly different facts. There, too, the justices have acquitted. The language of the case is slightly ambiguous, but I think it is plain that the words "before starting from Ipswich" must be read as qualifying the words "no contribution was asked for or received by the respondent," otherwise the finding would be inconsistent with the admission that the respondent subsequently received sums of two shillings from two of the other passengers. In contrast to the case of Miss Cross, there was nothing to indicate that contributory payments were contemplated from the outset or that there was any antecedent contract. That appeal must be dismissed.

In Mr. Chenery's case, as in Mr. Cook's, I am not prepared to say that the justices were wrong, and that appeal will be dismissed.

I desire to add one word on the methods observed. It is quite clear, if it had not been for the admissions extracted by some officers from persons in the taxicabs, the prosecution would have had no evidence to go on. The fair thing would be to administer some warning that persons are not bound to answer such questions, and it may well be that they will think it prudent to refrain even from words of good omen.

DU PARCQ and GODDARD, JJ. concurred.

Solicitor : *The Treasury Solicitor* (for the appellant).

[Reported by H. P. LANSDALE RUTHVEN, ESQ., Barrister-at-Law.]

Re HULTON, MIDLAND BANK EXECUTOR AND
TRUSTEE CO. LTD. v. THOMPSON.

[CHANCERY DIVISION (Clauson, J.), May 6, 7, 1936.]

Trustee—Bank—Express charging clause—Income fee—Incidence.

Testator directed an annuity and certain expenses of a residence provided for his wife to be paid out of the income of his estate. Subject to these payments the income was distributable to those interested in the residuary estate. There was a further clause which entitled the Midland Bank Executor and Trustee Company, Ltd., to receive remuneration for its work as trustee and in particular an income fee on all income collected, distributed or accumulated. There was no question of any deficiency of income:—

HELD: no part of the income fee was payable out of the annuity or the expenses referred to, but such income fee was wholly payable out of income after those sums had been paid.

[EDITORIAL NOTE.] The practice of appointing a bank or an insurance company as executor and trustee of a will is increasing and this case which deals with the incidence of the income fee charged by such a trustee is therefore of particular interest. The decision is, in short, that just as administration expenses are payable out of residue, so this administration expense of income is payable out of the residue of the income and not out of sums charged on income such as annuities.

AS TO REMUNERATION OF TRUSTEES, see HALSBURY, 1st Edn., Vol. 28, Trusts, pp. 162–164, paras. 335–337; and FOR CASES see DIGEST, Vol. 43, pp. 773–775, Nos. 2136–2147].

Case referred to:

(1) *Re Bentley, Public Trustee v. Bentley*, [1914] 2 Ch. 456; 43 Digest 1035, 4761.

ADJOURNED SUMMONS for the determination of certain questions arising out of the administration of the estate of Sir Edward Hulton, Bart., deceased.

The testator, who died on May 23, 1925, by his will dated Nov. 27, 1924, appointed the plaintiff company (under its then title of The London City and Midland Executor and Trustee Company, Limited) and his wife the defendant Florence Elizabeth Millicent Thompson (then and therein described as “Lady Florence Elizabeth Millicent Hulton”) to be the executors and trustees thereof, and provided (*inter alia*) as follows:—

Clause 7.—As regards his leasehold house, No. 51, Great Cumberland Place or any other house in London which he might occupy at the date of his death the testator gave the same to his trustees upon trust to permit his wife to occupy and enjoy the same during her life free of all rent rates taxes insurance premiums and cost of repairs, all of which should be borne by his estate and upon her death for his daughter Frances.

Clauses 12 and 13.—The testator gave devised and bequeathed all his estate both real and personal whatsoever and wheresoever not otherwise disposed of to his trustees upon trust to sell and convert the same into money and to pay thereout his funeral and testamentary expenses debts and legacies and the duty on any

devises legacies or annuity given free of duty and the annuity thereafter given to his wife and to invest the surplus of such moneys and to hold his residuary estate and the investments from time to time representing the same (referred to as his "trust estate") upon the following trusts, namely that

Clause 14.—Out of the yearly income of his trust estate his trustees should pay to his said wife during her life such an amount as would give her a clear yearly sum of £12,000 after paying or deducting income tax and super tax at the rate from time to time in force. . . .

Clause 15.—Subject as aforesaid his trustees should stand possessed of his trust estate as to two-thirds thereof (called "Edward's Fund") upon certain trusts for his son Edward George Warris Hulton, the second defendant, and as to the remaining one-third thereof upon certain trusts for his daughter Frances.

The testator also directed that

Clause 32.—The plaintiff company in its capacity as executor or trustee of his will might act by its proper officer or officers and should be entitled to remuneration free from duties in accordance with the scale of fees in force at the date of the will or such other scale (if any) as might be arranged by written agreement between the testator and the plaintiff company. No such agreement was entered into, and under the scale in force at the date of the testator's death the plaintiff company was entitled to charge (*inter alia*) an income fee of 15s. per cent. on all income collected, distributed and accumulated.

The testator's estate at his death considerably exceeded £2,000,000 and the net residuary estate was a very large one. In 1928 the testator's widow became the wife of John Henry Thompson, and his daughter Frances, who had married the third defendant, Greville Stevens, died on Feb. 26, 1932, leaving one child, Jocelyn Edward Greville Stevens, the fourth defendant. By her will she appointed Greville Stevens and another to be the executors and trustees thereof, and out of the income arising from her share of the trust fund under the testator's will appointed an annual sum to her husband Greville Stevens. The testator at his death was in occupation of a house, No. 50, Upper Brook Street, which his widow occupied until Aug. 1934.

The plaintiff company proceeded to administer the testator's estate in accordance with the provisions of his will, and charged the whole of their income fee as trustees in respect of the income of the trust estate of the testator against the shares therein of the testator's son and daughter. The question before the court was whether they were right in so doing or whether a part or parts of such income fee should not have been charged against and paid out of the sums payable to the testator's widow under clauses 7 and 14 of the will.

Wilfrid M. Hunt, for the plaintiffs, stated the facts.

Gerald Upjohn, for the first defendant, the testator's widow: The *prima facie* rule is that the income fee should be borne wholly by the residue. There are two points to be considered: (1) on a true construction of clause 14 the use of the words "clear yearly sum" puts an end to the matter. It is plain on the authorities (*a*) that these words

by themselves would not free the annuity from tax, and so the testator added the words "after paying or deducting income tax and super tax" to ensure that his intention that it should be paid free of tax should be effective; (b) that these words would not free the annuity from death duties, but that has been provided for by another clause in the will. In these circumstances it is necessary to find some other meaning for the words "clear yearly sum" if they are not to be treated as redundant, and the obvious meaning to be given to them is that they express the clear intention of the testator that the widow is to have 12,000 sovereigns or their equivalent put into her hands every year.

(2) As a matter of principle the bank could receive no remuneration as trustees unless its payment was authorised by the will of the testator, or it was a question of the appointment of new trustees by the court under the Trustee Act, 1925, s. 41. That being so, clause 32 of the will is in fact a legacy or annuity to the Midland Bank which is given free of duty, the testator directing that instead of the bank being paid a fixed yearly sum, the amount of their remuneration should be calculated in accordance with certain rules. That being so it is plain that the widow's annuity does not bear any part of that legacy, or of the legacy duty from the payment of which it is freed. *Re Bentley, Public Trustee v. Bentley* (1) has no application to this case. That was a case of the Public Trustee, who is a creation of statute, and who is entitled by statute to a commission for his services, regardless of what a testator says. It is clear that ASTBURY, J., in *Re Bentley* (1) was accepting the view that the payment to the public trustee was a statutory charge on income and therefore had to be borne *pari passu* out of all kinds of income.

Hon. Denys Buckley for the remaining defendants, who were entitled to the residue of the testator's trust fund, subject to the widow's share: The court must look at the substance of the matter and deal with the incidence of the charge as if it was an ordinary administration expense, arising out of the carrying on of the business of the trust. The artificiality of regarding the payment to the bank as a bounty of the testator is emphasised by the fact that the revenue do not claim any legacy duty on charges made in this way. If the court takes the view that this fee is an administration expense chargeable against income I rely on *Re Bentley* (1) as, although that case does not bind the court as it is an authority on the Public Trustee, yet it would be an odd thing if a principle were to apply in a case where the Public Trustee is the trustee which is different from that which is to apply in cases where he is not.

CLAUSON, J.: In 1924 the testator made his will and the material part of it is that he gave all his property to his trustees on trust to pay his funeral and testamentary expenses, debts, legacies and duty on legacies given free of duty, and to hold his residuary estate on the

following trusts. The first trust was out of the yearly income of his trust estate to pay to his wife an annuity, and the annuity was so calculated that the income of the trust fund had to bear not only the annuity but also the income tax and super tax payable in respect of it. There was also a provision that some part of the income of the trust fund was to be used for paying certain expenses of the residence provided for the testator's wife. Subject as aforesaid, that is, after they had, out of the income of the trust fund, set aside a fund with which to provide the annuity and to make these other payments, the trustees were to stand possessed of the testator's trust estate upon the trusts thereafter declared, whereby certain persons were entitled to the residue of the testator's estate. The will also contained this clause, that the trustees, who are the Midland Bank Executor and Trustee Company, Limited, should be entitled to remuneration free from duties in accordance with the scale of fees in force at the date of the will or such other scale (if any) as might be arranged by written agreement between the testator and the trustees; and one provision in the scale of fees which is thus indicated in the will, is a provision that the trustees should be entitled to receive an income fee, which is a fee of 15s. per cent. on income collected, distributed or accumulated, and nobody doubts that the trustees are entitled, out of the income of the estate administered by them, to be paid a fee of 15s. per cent. on the amount of that income. This is not a question between a tenant for life and remaindermen; it is a question between those interested in income, and according to the evidence, I am reading from the affidavit in support of the summons, up to the present the plaintiff company (i.e., the trustees) have charged the whole of their income fee as trustees in respect of the income of the trust estate of the testator, against the shares therein of the testator's said son and daughter (they are the people who are interested in the income subject to the annuity and other benefits provided for the widow). The affidavit goes on:

Doubts have now arisen as to whether a part or parts of such income fee should not have been charged against and paid out of the sums payable under clause 7 of the said will in respect of rents rates taxes insurance premiums and repairs for the benefit of the defendant Florence Elizabeth Millicent Thompson and the sums chargeable or payable under clause 14 of the said will in respect of the annuity and tax thereby given to the said defendant.

Then details are given of the amount of the income fee which has been paid.

The question which I have to determine is whether the trustees were right in charging the whole of the income fee against the residuary estate or whether they ought to have in the past, and should in the future, charge the 15s. per cent. in respect of the income fee over the whole of the income, thus charging the annuity with a proportion of that income

fee. If I accept the latter view there will be apparently no difficulty in adjusting the past accounts because the fee of 15s. per cent. is a small matter as compared with the income, which in this case is very large.

There are two theories as to the remuneration for administering this income. It can be regarded as being a legacy to the trustees in consideration of the work which they do as trustees. That is, it can be regarded as being on the same par as the provision which one not infrequently finds in a will that a trustee shall be entitled to an annual provision as long as he acts as trustee, of ten or fifty guineas, or whatever it may be, a year. Thus it might be a legacy, or it might be looked at from a slightly different point of view, and regarded as a trust expenditure, and thus be payable as part of the administration expenses authorised by the will. I do not think it matters at all, for the purposes of the question which I have to decide here, in which way the thing is envisaged. What I have to see is whether there is in this will a provision which indicates the way in which the charge is to be borne. In my view on this will, and the same observation would apply to any will in which there was an annuity charged on income, it is perfectly clear that the persons who are interested in the income, other than an annuitant, are to take nothing until the annuity is paid in full. Until the annuity has been paid they will not take the rest. They are in respect of this income in the position, as compared with the annuitant, in which a residuary legatee is, in ordinary cases, as compared with a pecuniary legatee. Administration expenses must necessarily fall upon the residuary legatee, assuming, of course, the fund is sufficient, and not upon a pecuniary legatee. So far I see no reason whatever why any expenses incurred in administering a fund, which ultimately have to be borne by the person in the position of a residuary legatee, should not be discharged and indemnified by the person entitled to the residue. That seems to be the *prima facie* position, and in saying that I am treating the income fee as an administration expense. I may say that it is entirely new to me that an ordinary income administration expense, where there is an annuity, has to be discharged before the annuity is distributed to the person entitled to it, and should be charged against the annuity.

But let us assume that the right way to look at the matter is that this is a legacy, on the same footing as an annuity to the trustees for their work. Why should any part of that be charged upon the annuitant? It is simply another annuity charged on income, an annuity which has to be met before those entitled to the balance left of the income receive what they are entitled to. On what possible principle could that be charged upon the annuity? I confess I am unable to follow the argument. And so, approaching the matter from either of these two alternative points of view, I think it is clear that the income fee must

be borne by those to whom the balance of the income is payable. I am not dealing with the case where there is a deficiency. If there was not enough income to pay the annuity, of course the annuitant would have to bear part of the income fee. I can see that there is a possible point in that if the income fee is to be regarded as a legacy. But I am not dealing with that point. I am dealing with a case where there is ample to pay the annuity and the income fee.

I have not found in this matter any assistance from authority. I have been referred to the case of *Re Bentley, Public Trustee v. Bentley* (1), decided by ASTBURY, J. That was a decision which had to do with the Public Trustee Act and with certain rules made under that Act, and, as far as I can judge, in the course of the argument as reported, the discussion seems to have turned mainly on the operation of those provisions, which do not apply to the case before me. So far as that case goes it is decided on those provisions. But it is suggested that some principle must be deduced from the judgment of ASTBURY, J., in that case as to the matter with which I have to deal. I can only say, after reading that decision with the utmost care, and after having the assistance of counsel in the matter, that I am quite unable to formulate to myself any principle which can be deduced from that decision. Unless some principle can be deduced from that decision bearing on the present case, there the matter must rest. It would be impertinent for me to express any view as to whether, if that case had come before me, I should have decided it as ASTBURY, J., decided it.

I therefore answer the questions asked by the summons by declaring that no part of the income fee chargeable by the plaintiffs as trustees in respect of the income of the trust estate should be paid out of (a) the sums payable under clause 7 of the will in respect of rent, rates, taxes, insurance premiums and repairs for the benefit of the first defendant, or (b) the sums charged or payable under clause 14 of the will in respect of the clear annuity thereby bequeathed to the first defendant, including taxes. But this is without prejudice to any question which may arise in case of a deficiency of income. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *Linklaters & Paines* (for the plaintiff and the second, third and fourth defendants); *Withers & Co.* (for the first defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

DAVIS v. LISLE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq and Goddard, JJ.), **April 30, 1936.**]

Police—Execution of duty—Entry upon premises without search warrant—Refusal to leave when asked—Assault.

Two police officers, one in uniform and the other in plain clothes, seeing in a garage a motor lorry which had earlier been causing what the police officers thought to be an obstruction, entered the garage to make inquiries as to the person responsible for the obstruction. Neither had asked nor obtained permission to enter, and neither had a search warrant nor was authorised to enter. As the officer in plain clothes was speaking to the men who were attending to the lorry, the occupier of the garage came in and in strong terms told the police officers to leave the premises. The officer in plain clothes proceeded to take out his warrant card, whereupon the occupier assaulted him. Charges were brought against the occupier *inter alia* for assaulting and for obstructing a police constable in the execution of his duty as such constable, and he was convicted. The occupier appealed :—

HELD : (i) the producing by the officer in plain clothes of his card was an assertion of his right to remain.

(ii) as soon as the occupier told the officers to leave and they did not do so they became trespassers and were not acting in the execution of their duty. The assault was therefore not committed when the constable was acting in the execution of his duty and the convictions should be quashed.

Per GODDARD, J. : in the circumstances the police officers were acting in the execution of their duty when they entered upon the premises and they were not trespassers until they were asked to leave and did not do so.

[EDITORIAL NOTE.] The power of police constables to enter premises for the purpose of arresting a person is confined to cases of felony when they are acting without a warrant, and it is clear that they have no power to enter for the purpose of mere inquiry. The question, therefore, of trespass is purely one of whether the fact that the premises were open to the public generally amounted to a general invitation to anyone having any sort of business with the proprietor of the premises to enter.

FOR THE RIGHT TO ARREST ON PRIVATE PREMISES, see HALSBURY, Hailsham Edn., Vol. 9, p. 98, para. 124 ; and FOR THE CASES, see DIGEST, Vol. 14, p. 186, Nos. 1654-1660.]

Cases referred to :

- (1) *Great Central Railway Co. v. Bates*, [1921] 3 K.B. 578 ; 36 Digest 40, 239.
- (2) *Galliard v. Laxton* (1862), 2 B. & S. 363 ; 14 Digest 187, 1674.
- (3) *Codd v. Cabe* (1876), 1 Ex. D. 352 ; 43 Digest 437, 647.
- (4) *R. v. Crompton* (1880), 5 Q.B.D. 341 ; 14 Digest 188, 1680.
- (5) *Thomas v. Sawkins*, [1935] 2 K.B. 249 ; Digest Supp.
- (6) *R. v. Marsden* (1868), L.R. 1 C.C.R. 131 ; 14 Digest 180, 1588.
- (7) *Tulley v. Reed* (1823), 1 C. & P. 6 ; 43 Digest 397, 199.

APPEAL by way of case stated from a decision of the County of London Quarter Sessions affirming three convictions of the appellant upon charges of (i) unlawfully assaulting a constable of the Metropolitan Police Force

in the execution of his duty as such constable ; (ii) unlawfully and wilfully obstructing a police constable in the execution of his duty as such constable ; and (iii) unlawfully, wilfully and maliciously damaging to the extent of 7s. 6d. a serge tunic belonging to the receiver of the Metropolitan Police.

The appellant was a member of a firm who occupied a garage in Bethnal Green. On July 11, 1935, there was a lorry in the street which the respondent and another police officer thought was causing an obstruction. They went away for about five minutes and on returning saw that it had been moved into the garage. They entered the garage for the purpose of making inquiries as to the person causing the obstruction. Two men who had previously been seen at work underneath the lorry in the street were similarly occupied under the lorry in the garage. The appellant entered the garage and told the officers to go as they had no right to be there. He then committed the assault complained of.

The appellant was convicted at Old Street Police Court upon each of the three charges set out above, and appealed to the County of London Quarter Sessions. The court of quarter sessions came to the conclusion that the officers were acting in pursuance of their duty and affirmed the convictions. The appellant appealed.

R. P. Croom-Johnson, K.C., and *J. F. Eastwood*, for the appellant: The officers in the circumstances of this case had no right to enter upon the garage. The case stated apparently decides that an offence had been committed. It had not been committed by the appellant, but presumably by the person in charge of the vehicle, if at all. There was nothing to show that the appellant had anything to do with the obstruction in the street or that he was responsible at all for the two men who were repairing the lorry. Although the police officers were seeking to obtain information, that is not sufficient, and if a person resists them, he is not guilty of assaulting a police constable in the execution of his duty. They had no warrant. [Counsel referred to *Great Central Railway Co. v. Bates* (1), *Galliard v. Laxton* (2), *Codd v. Cabe* (3), *R. v. Crompton* (4), *Thomas v. Sawkins* (5), *R. v. Marsden* (6).]

G. G. Raphael, for the respondent : An important question of principle is involved and this question of principle has only arisen since the conviction in the police court. Had it been raised then, an application would have been made to add a charge of common assault. At the police court, the defence was that the police were telling lies. The question here is what were the limits to acts done by police officers in the execution of their duty. Any lawful act done by a police officer on duty is in the execution of his duty. It was a lawful act to go to the premises. It was indicated in the case of the *Great Central Railway Co. v. Bates* (1) that different considerations arise in the case of a private house. It is a matter of public importance that police officers who are exercising a

public function should be supported in their actions when they are lawful. If the only correct inference is that the officer, by producing his warrant card, was asserting a claim to be upon the premises, it is conceded that the appeal must succeed. But it is not only open to that interpretation. The officer was in plain clothes and it was his duty to identify himself as a police officer. There was no evidence that the officer went further than was necessary to establish the purpose of his visit; to speak to the occupier of the premises. It was not right that the officers should be greeted in the way they were. The officers were not trespassers *ab initio*; they were not trespassers at all. [He referred to *Tullay v. Reed* (7).]

LORD HEWART, L.C.J. : This is a special case stated by the court of quarter sessions for the County of London. It arises out of an appeal from three convictions of the appellant. The first was a conviction for unlawfully assaulting a constable of the Metropolitan Police Force in the course of his duty as such constable; the second was for unlawfully and wilfully obstructing a police constable in the course of his duty as such constable, and the third was for unlawfully and maliciously damaging certain property, that is to say, a serge tunic belonging to the receiver of the Metropolitan Police Force. The appellant having appealed from these convictions to quarter sessions, was unsuccessful. His appeal, with regard to all three informations, was dismissed. We have to consider whether the quarter sessions came to a correct decision in point of law.

The point of substance which has been dealt with in argument is whether it is true to say that on the day named, and in the circumstances which are referred to, the police officer, the respondent, was acting in the course of his duty as a police officer. There is no reason to reiterate all the facts which have been clearly stated. The point was that the police officers noticed a motor lorry in the street which they believed to be causing an obstruction. Two men were concerned in the matter and it was said that they had committed an offence under the Metropolitan Police Act, 1839, s. 54. The officers went along the street and after about five minutes came back to find that the lorry had been moved into the private garage occupied by the firm of which the appellant is a member. Thereupon, the officers entered the garage in order to make inquiries as to the person responsible for the obstruction. Neither of them asked nor obtained permission to enter. Neither had a search warrant nor was authorised to enter. The two men they had seen in the street were found to be similarly occupied under the lorry together. The respondent spoke to them and the other officer who was in uniform stood near the door. Thereupon the appellant entered the garage from the street, pushing past the officer in uniform, and said "What is this? What do you want here?" To that question the officer in

uniform replied : " My colleague is a police constable. May we see the person in charge of the vehicle ? " Thereupon the appellant said : " Get outside. You cannot come here without a search warrant." The respondent was then in the act of producing his warrant card and the appellant rushed at him and committed the assault complained of.

Now, in that state of affairs it was contended on the part of the appellant that the police officers, being trespassers, had no right, in the circumstances, to enter the garage, and therefore were not acting in pursuance of their duty when they were on the premises. Also, it was contended that there was a duty to prove that the police officers were in the execution of their duty and there is no evidence to that effect. The contention on the part of the respondent was, and was this alone, that the police officers, having witnessed an offence, were acting in the execution of their duty in entering upon the premises in which the offenders then were. If this case is accurately stated, as we must take it to be, and as we suppose it to be, the respondent was relying upon an argument which contained two errors. One was that the police officers had seen an offence actually being committed in the street and the other was that they were in the execution of their duty in entering and being upon the said premises on which the offenders then were. That is clearly the argument and the only argument made on behalf of the respondent in the court below. In these circumstances the court came to the conclusion that they were acting in the pursuance of their duty and convicted the appellant accordingly.

It is necessary to distinguish two things. The question whether these officers at the material time were acting in the execution of their duty is one thing. It is quite a different question whether that which the appellant did was justified by the view that he took that the officers were trespassers. I am not dealing with that second question at all. It may be that the question may have to be otherwise determined. The point that was raised here with regard to the first two convictions is : Were the officers acting within the execution of their duty ? In my opinion, they were not, and there are no grounds upon which they could be held to be so acting. Certainly the ground which is put forward seems to me to be quite beside the point. I feel a difficulty in putting the proposition that, because the police officers had witnessed an offence being committed, they were acting in the execution of their duty in entering and remaining upon private premises because the offenders were then upon those premises. Admittedly there was no search warrant here. It is one thing to say that the officers were at liberty to enter this garage to make an inquiry and another thing to say that they were entitled to remain after, with emphasis, the appellant said : " Get outside. You cannot come here without a search warrant." From that moment on, it seems to me that the officers were trespassers. It is quite clear

that that which the respondent was doing, before the committing of the assault complained of, was tantamount to putting forward a claim to be where he was. He was putting forward a warrant card. That was after he had been told to get out. Mr. Raphael, with his usual candour, admitted that if on that finding of the case, the producing of his warrant card was to be construed as asserting his right to remain, it is not possible to contend that the respondent was acting in the execution of his duty. I think it is quite clear that the act of producing his warrant card was an assertion. I cannot think that there was any ambiguity about it. The law upon the matter seems to me to be reasonably plain. We have been directed by Mr. Croom-Johnson to various cases—some of them a little remote from the present controversy. The case of the *Great Central Railway Co. v. Bates* (1) seems very much in point. I should like to read a passage from the judgment of ATKIN, L.J., as he then was, at p. 582 :

This is a matter of very considerable importance, because the case has been put on the analogy of a person having a right as a matter of public duty to enter into premises, and we know that such powers and privileges are occasionally given to persons who are not constables. It appears to be very important that it should be established that nobody has a right to enter premises except strictly in accordance with authority.

In my opinion, upon these materials it is not possible to maintain the conclusion that at the material time the respondent was acting in the execution of his duty as a constable. That conclusion by no means disposes of everything contained in this case. It does not dispose of the question whether, upon any view of the matter, the assault which was in fact committed was justified. We have not the materials before us to help us to determine that question. The appellant was not prosecuted for assault. He was prosecuted for assault upon and obstruction of a police officer in the execution of his duty. Nor does this conclusion affect the third of these convictions. The serge tunic which was damaged—by wilful and malicious damage, according to the conviction—was a serge tunic of one of the officers, belonging to the receiver of the Metropolitan Police Force. Upon that part of the case no question arises whether at that moment the officer was in the execution of his duty. I see no reason why we should interfere with that conviction. But with regard to the first two convictions, that is, whether at the critical moment the officers were acting in the execution of their duty, I think the conclusion of the court of quarter sessions wrong. As regards the pith and substance of this case, the appeal ought to be allowed and the case sent back to the court of quarter sessions with a direction that at the time referred to, the respondent was not acting in the execution of his duty.

DU PARCQ, J. : I agree with my Lord as to the proper result of this appeal.

The argument did not satisfy me that it was the duty of the respondent to enter the appellant's garage in order to collect inquiries. Whether my view is right or wrong, I am quite clear that the respondent had no right to remain on the premises when once the appellant had intimated that he should leave. As the case of the *Great Central Railway Co. v. Bates* (1) has been referred to, I should like to say this. From a very clear recollection of the case and from what appears in the judgment, I think it is wrong to say, as the headnote says, that the police constable in that case entered the warehouse in the execution of his duty. It is easy to see how the mistake arose. It appears that LORD STERNDALÉ, M.R., remarked at the beginning of his judgment : " While acting in the execution of his duty." That no doubt accounts for the inclusion of those words in the headnote ; but when the judgment of LORD STERNDALÉ, M.R., is read as a whole, and the judgment of ATKIN, L.J., is read, it seems to be plain that neither thought that the constable was acting in the execution of his duty and I have no doubt that what LORD STERNDALÉ, M.R., meant was that he was acting in the course of employment and should obtain compensation from the employers. I think that is what LORD STERNDALÉ, M.R., meant, because the headnote might be misleading and may, in this case, have mislead the court below to some extent.

GODDARD, J. : I agree. I only add a few words. Mr. Raphael, in the course of his argument, has argued that the police officers were not trespassers in going on the premises. I think it cannot be contended that where you have such premises as an open garage, as where you have a shop, there is not an invitation to all persons having business with the owner of the premises to go and enter upon the premises. How far that extends to a police officer who is engaged in making inquiries may be a matter suitable for consideration. But considering that in this case it is found that the police officers saw first of all a lorry obstructing the street, and later that it had been removed into the garage, I am of opinion that there was an invitation to the officers to enter the garage. They bring themselves within the class of invitees, because there was a sufficient interest. There was sufficient to justify the officers in saying that it was their lawful business to make inquiries. I assume therefore, that the officers, in crossing the threshold, were not trespassers. The fact is that these officers thought they had a right to be there, having seen the offence in the street committed, and had a right to stay until they got some satisfaction. Mr. Raphael said, in the course of his answer, that if the officer had not produced his warrant card, the appellant would have been justified in turning him out. Whether he produced his warrant card or not makes no difference at all. It makes no difference whether

he was a police constable or not. He was not acting in the execution of his duty after he was asked to leave and therefore these convictions cannot stand.

LORD HEWART, L.C.J. : The appellant has succeeded on the really substantial controversy and he ought to have his costs. The case will go back to quarter sessions with a direction that these two convictions will be quashed.

Solicitors : *Hicks, Arnold & Bender* (for the appellant) ; *Solicitor to the Metropolitan Police* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

THE AEOLIAN COMPANY, LIMITED v. INLAND REVENUE
COMMISSIONERS.
INLAND REVENUE COMMISSIONERS v. THE AEOLIAN
COMPANY, LIMITED.

[KING'S BENCH DIVISION (Lawrence, J.), **May 7, 1936.**]

Income Tax—Dividends—Cumulative dividends—Guarantee—Payment out of profits—Annual payment.

By two deeds executed in 1920 an American company guaranteed the payment by an associated English company of the dividend on its preference shares at the rate of 6 per cent. The English company later raised the rate of dividend to 7½ per cent. and without any further deed the American company assumed liability for the additional dividend. The English company in one year having no funds for such payment, the following procedure was followed : the American company authorised the English company to make the payment, and the latter company issued dividend warrants for the amount of the dividend less tax. The English company then debited the American company with the gross amount of the dividend :—

HELD : (i) the effect of the transaction was a payment of the gross amount by the American company and not of the net amount.

(ii) the payments when received by the shareholders were income in their hands and liable to tax.

(iii) the company was rightly charged under All Schedules Rules, r. 21.

[EDITORIAL NOTE. The main contention in this case is that, as the dividends were cumulative, and the English company, if it did not pay in the year in which they accrued due, would be bound to pay them at some future time, the payment by the American company was in discharge of a future liability of the English company. Such a payment, it was contended, could not be treated as a distribution of profits, and the payment was not therefore income in the hands of the shareholders. It was, however, held that the liability of the American company under its guarantee was a liability to provide annual payments to the English shareholders.

AS TO AMOUNTS RECEIVED IN LIEU OF TRADE RECEIPTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 126, 127, para. 237 ; and FOR CASES, see DIGEST, Vol. 28, pp. 18-20, Nos. 92-99.]

Cases referred to :

- (1) *Moss Empires v. Inland Revenue Comrs.* (1936), 15 Ann. Tax Cas. 75 ; Leaflet 851.
- (2) *Chibbett v. Robinson (J.) & Sons* (1924), 9 Tax Cas. 48 ; 28 Digest 19, 98.
- (3) *Hawley v. Inland Revenue Comrs.* (1925), 134 L.T. 502, 9 Tax Cas. 331 ; 28 Digest 110, 682.
- (4) *Manton's (Lord) Trustees v. Steele, Steele v. Manton's (Lord) Trustees* (1927), 11 Tax Cas. 549 ; Digest Supp.
- (5) *Chamney v. Lewis* (1932), 17 Tax Cas. 318 ; Digest Supp.
- (6) *Gilbertson v. Fergusson* (1881), 7 Q.B.D. 562 ; 1 Tax Cas. 501 ; 28 Digest 79, 431.

CASE STATED under the Finance Act, 1927, s. 26, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The facts and arguments fully appear in the judgment.

J. Millard Tucker, K.C., and *J. S. Scrimgeour*, for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.), and *Reginald P. Hills*, for the respondents.

LAWRENCE, J. : In this case I agree with the decision of the commissioners. I think the appeal should be dismissed. The facts of the case may be summarised in this way. There was an English company called the Aeolian Company, which is the appellant company, formed in 1912, with a capital of 400,000 £1 ordinary shares and 300,000 6 per cent. cumulative preference shares. The whole of the ordinary shares were held by an American company, the Aeolian Weber Piano and Pianola Company of New York, and in 1912 the English company offered 250,000 of its 6 per cent. cumulative preference shares for subscription to the public, and 57,117 of those shares were taken up by the American company, and the balance was taken by the public. The American company at that time guaranteed the payment of the preference dividend of 6 per cent., and it did so by two deeds, both of which are scheduled to the case. In 1920 the English company raised its preference dividend to 7½ per cent., and the American company, although it did not guarantee the 1½ per cent., has on several occasions since then accepted liability for that extra 1½ per cent. The English company has not earned profits in the recent years and in the years in question in this case did not earn profits and had to call upon the American company to implement its guarantee. The question raised in this case is, when the American company was called upon in the years in question to pay under its guarantee, whether in fact it did pay and whether when the English company paid the amount so guaranteed to its cumulative preference shareholders it was bound to deduct income tax under the All Schedules Rules, r. 21.

The first point that is raised is this. It is said by the appellants that

in the facts of this case the English company, who have been assessed under rule 21, was not a "person by or through whom any such payment"—that is to say an annual payment charged with tax under Sched. D—was made and that, therefore, they did not have to deduct the tax. The particular facts upon which this question turns are as follows. On May 29, 1931, the English company advised the American company that they had no profits, and that accordingly they had to call upon the American company under its deed of covenant and guarantee to give effect to that guarantee. On June 18, 1931, the American company passed a resolution :

That the English company be authorised to make payment of this dividend at the rate of $7\frac{1}{2}$ per cent. per annum, due July 1, 1931, from funds in its possession, for the account of this company ;

that is to say of the 6 per cent. for which the American company was liable under its guarantee, and of the $1\frac{1}{2}$ per cent. for which it was not legally liable. That resolution was communicated to the English company on June 18, 1931, in a letter in which the American company stated that by vote of the board of directors they would again assume the obligation of paying preference dividends at the rate of $7\frac{1}{2}$ per cent., and that the English company was therefore authorised to cause dividend payments to be made at that rate.

The English company accordingly issued its ordinary dividend warrant for each of the four half-yearly payments with which we are concerned in this case, showing a deduction of income tax from the dividend and certifying that the income tax deducted would be paid to the proper officer for receipt of taxes. The English company also wrote on Dec. 31, to all the other shareholders pointing out that the American company had again agreed that it would undertake not only what was strictly due under its guarantee, but also the other $1\frac{1}{2}$ per cent. Those dividend warrants were accordingly sent out to all the preference shareholders with a note on them that the Inland Revenue Department would receive the statement on which the note was made as a voucher for the purposes of income tax. The English company having carried out the authority of the American company in this way debited the American company with the gross amount of $7\frac{1}{2}$ per cent. on the issued amount of preference capital. The English company provided the money, but debited the American company with the gross amount. The contention for the appellants on this aspect of the case is, as I have understood it, not that the mere fact that there is no actual payment by the American company to the English company prevents the application of rule 21, but that the true inference is that the English company only agreed with the American company to pay the net sum, which in fact it did pay, to its shareholders. It was put in particular that the authorisation by the American company,

that is to say the resolution of authorisation and the letter, was merely an offer to indemnify the English company, and that the English company never accepted that offer in whole, but only accepted it in part, and paid in accordance with its acceptance the net sum. In my judgment that is not the true inference to be deduced from the facts of the case. In my opinion the demand made by the English company, which originated the matter, was for payment of the gross sum. The warrants, which it is true were not in strictness dividend warrants, but which had been so referred to by the American company, referred to a payment of dividends. The warrants were drawn up on the basis of there being a gross sum and a deduction from that gross sum of income tax. Finally the English company debited the American company in its own books with the gross sum. All those facts, in my opinion, are consistent and consistent only with the notional payment by the American company of the gross sum to the English company with the intention that the net sum should be paid over to the shareholders of whom the American company was one, and that the appropriate amount of income tax should be deducted. The fact that the net sum only was paid is possibly consistent with the view put forward by the Crown, and the fact which was also relied upon that in the English company's books the Crown were not credited with the income tax does not seem to me to affect the force of the other evidence upon this issue. It seems to me to be consistent with the view that the English company had either determined not to pay this income tax or was waiting to make up its mind or to receive instructions as to whether it should pay the income tax or not. I therefore hold that so far as this contention is concerned rule 21 is applicable.

The next point that was raised by Mr. Tucker on the case was that even if rule 21 was applicable these sums which were received by the preference shareholders were not income of the shareholders, and on that argument he referred for the purposes of distinguishing it to the case of the *Moss Empires v. Inland Revenue Commissioners* (1). That was a case very close in its facts to the present case, the only material distinction being that there instead of having an American company and an English company there were two English companies, and the payment of guarantee was made by an English guarantor company. It was there held by the Court of Session that such payments of guarantee fell within general rule 21. But it was said by Mr. Tucker that so far as this point of the case was concerned, as to the payments not being income in the hands of the shareholders, that point was conceded by counsel for the company in that case and that, therefore, the case does not conclude or have any real important bearing upon his argument on that matter. My attention has been called to various passages in the judgments which indicate that the concession was not entirely relied upon, but I think that I ought to consider the matter, apart from that case having regard to the fact of

the concession by counsel for the company there concerned. The argument is that because this was a cumulative dividend, and because the deeds entered into by the American and the English companies discharged the English company from its liabilities in respect of these cumulative dividends in the future in the event of a payment by the American company on its guarantee, therefore on the authority of such cases as *Chibbett's* case (2) and *Hawley's* case (3), the payments made under this guarantee cannot be treated as profits in the hands of the shareholders for the year in which they are made, because in the way that I have described they discharge a future liability to pay profits of the English company. The cases which I have just cited were cases where there had been, in the first case, an agreement to compensate its directors for the loss of their offices in the future, and in the other case (*Hawley's* case (3)) a composition in one year in respect of future profits. But, in my opinion, those cases are not conclusive of the present matter. Here the American company was under a present liability antecedently created which arose from year to year and gave rise, as the Court of Session has held, or might give rise, to what are annual payments within rule 21, and the fact that those annual payments had the effect of discharging the liability of the English company instead of possibly future dividends does not, in my opinion, affect the fact that sums so received were income of the shareholders when they were received. The payment of them extinguished the liability of the American company in that year. Mr. Tucker argued, as I understood him, that the same thing could have been said in *Hawley's* case (3), and in *Chibbett's* case (2), because from the moment that the agreement of composition or for the payment of compensation to the directors was made, there was a present liability. I do not think that that is the same position as obtains in this case. Here there were these two deeds which created the liability of the American company entered into in 1912, and under which the American company was called upon to implement its liability in these succeeding years. I therefore hold that this point cannot be substantiated, and that the sums which were paid to the shareholders were income in their hands.

The third point that is raised on behalf of the appellant company is that this was a foreign possession and that, therefore, it falls within sched. D, case V, and not under case III, and that the assessment ought to have been made under miscellaneous rule 7 of sched. D, and not under rule 21. This is a point which was only raised so slightly apparently before the commissioners that they did not notice it. I do not think it is necessary for me in the view that I take to decide whether this is a foreign possession within the meaning of the Income Tax Acts. I have been referred to *Manton v. Steele* (4), and *Chamney's* case (5). It was contended on behalf of the appellant company that miscellaneous rule 7 is applicable to the present case, and is exclusive, and that the Crown

must in cases which fall within miscellaneous rule 7 assess under that rule, and that rules 19 and 21 of the general rules are inapplicable wherever miscellaneous rule 7 applies. The question was argued before me whether miscellaneous rule 7 does apply. It was suggested that rule 7 did not apply to an annual payment made by a foreign company unless it was paid out of or in respect of stocks, shares or securities of the company, or funds *ejusdem generis* with stocks, shares or securities. That was the suggestion on behalf of the Crown. On the other hand Mr. Tucker pointed out that the word "funds" in sect. 7 (1) (b) relates to pensions, and he contended that the word "funds" must be used as applying to the moneys of any foreign company, and that rule 7 applies to every case in which interest, dividends or annual payments are made by foreign or colonial companies, and are entrusted to any person in the United Kingdom for payment to persons in the United Kingdom. But Mr. Tucker was, I think, driven to admit that miscellaneous rule 7 does not really introduce a different rule with reference to the subject-matter with which it deals from the rule which is introduced by rules 19 and 21, except in the matter of commission which is payable to the person entrusted with payment under the rules of sched. C. He referred me to the case of *Gilbertson v. Fergusson* (6), and pointed out that that was a case under the predecessor of rule 7. That was a case dealing with the affairs of the Imperial Ottoman Bank, and it was held that a proportionate rule with reference to the amount of the profit of the company concerned which had paid tax should be applied to the annual payments which were entrusted there to persons in the United Kingdom for payment to the shareholders in the United Kingdom. But he agreed at a later stage of his argument that that did not differ from the principle applicable to the construction of rules 19 and 21, and that similarly under rules 19 and 21, if the annual payment was made out of taxed profits, then the same principle would apply. He also drew my attention to the fact that under case V the measure of taxation is the year preceding the receipt of the income. But there again the same measure of taxation is introduced in the case of case III under which annual payments fall to be charged if they are not to be charged under case V as arising from foreign possessions. But in both cases, although the measure under those two cases is the year preceding the year of receipt, rules 19 and 21, which are of general application, provide for a different measure in cases to which they are applicable; that is to say, cases where the annual payment is made by a person in this country who is bound, in the case of rule 21, and entitled, in the case of rule 19, to deduct tax at the rate or rates of tax in force during the period for which the said payment is accruing due in the case of rule 19, and at the rate of tax in force at the time of payment in the case of rule 21, and in both cases upon the amount of the payment. It therefore appears to me that rules 19 and 21, and rule 7

too—because rule 7 also introduces a measure which is different from the measure provided for by cases III and V—are intended to be general rules applicable, as they say upon their face, to all cases, and as the only difference between rule 7 of the miscellaneous rules and rules 19 and 21 is the claim to commission which the person entrusted to payment might have, and as that claim to commission could be raised, as it seems to me, at any time by the person entrusted with payment in the event of his complying with the particular rules which are applicable to rule 7 of the miscellaneous rules, I see no ground for allowing this appeal on the ground that the assessment was improperly made under general rule 21. It has been laid down that the Crown can elect between cases, and I see no reason why that rule should not apply to an election between rules 7 and 21. I therefore come to the conclusion that the appeal must be dismissed with costs. The cross appeal was abandoned on the first day.

Solicitors : *Maples, Teesdale & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by LESLIE CARNEGIE, Esq., *Barrister-at-Law.*]

Re COLEMAN'S WILL TRUSTS, THE PUBLIC TRUSTEE v. COLEMAN.

[CHANCERY DIVISION (Clauson, J.), April 21, 22, May 8, 1936.]

Perpetuities—Will—Residue given upon trust for sale—Settled share—Discretionary trust for any widow donee may leave—Void limitation—Effect upon subsequent limitation—Alternative independent limitation.

A testator gave his residuary estate upon trust for sale and directed the proceeds to be divided between his five sons. The share of one son was settled upon discretionary trusts for the son during his life and after his death the income of the share was to be held upon discretionary trusts in favour of any widow whom he might leave and all or any of his children, and after the death of such widow the share was to be held upon trust for the children of the son, for sons upon attaining 21 and for daughters upon attaining 21 or marrying:—

HELD : (i) the trust for the widow was void as she might be a person born after the death of the testator and the discretion would then be exercisable at a date beyond that allowed by the perpetuity rule.

(ii) the trust for the son's children became vested in interest though not in possession within the period allowed by the rule against perpetuities, and was therefore a good limitation.

(iii) during the life of the widow the income must be treated as forming part of the son's estate.

[EDITORIAL NOTE.] It is said to be a question of construction whether the subsequent limitations are subject to the prior contingency or whether they are independent and alternative limitations. In the latter case only can they be valid, and that is held to be the case here. This case is of particular interest owing to the increasing use of protective trusts.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol 22, pp. 351, 352, para. 712, and FOR THE CASES, see DIGEST, Vol. 37, pp. 117, 118, Nos. 481-493.]

Cases referred to :

- (1) *Re Blew, Blew v. Gunner*, [1906] 1 Ch. 624 ; 37 Digest 79, 192.
- (2) *Evans v. Walker* (1876), 3 Ch. D. 211 ; 37 Digest 97, 335.
- (3) *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54 ; 37 Digest 108, 415.
- (4) *Re Thatcher's Trusts* (1859), 26 Beav. 365 ; 37 Digest 103, 385.
- (5) *Re Hewett's Settlement, Hewett v. Eldridge*, [1915] 1 Ch. 810 ; 37 Digest 118, 492.
- (6) *Re Backhouse, Findlay v. Backhouse*, [1921] 2 Ch. 51 ; 37 Digest 119, 511.
- (7) *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502 ; 37 Digest 69, 108.
- (8) *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535 ; 37 Digest 98, 336.
- (9) *Re Beynon-Winsor, Cartwright v. Winsor* (1917), 143 L.T. Jo. 178.
- (10) *Re Canning's Will Trusts, Skues v. Lyon*, [1936] 1 Ch. 309.
- (11) *Lassence v. Tierney* (1849), 1 Mac. & G. 551 ; 37 Digest 99, 346.
- (12) *Monyepenny v. Dering* (1852), 2 De G. M. & G. 145 ; 37 Digest 123, 548.
- (13) *Re Shuckburgh's Settlement, Robertson v. Shuckburgh*, [1901] 2 Ch. 794 ; 37 Digest 447, 510.

ADJOURNED SUMMONS to determine questions arising out of the will of Francis House Coleman, who died on Oct. 26, 1919.

The will was dated July 26, 1918, and by it, so far as relevant to the present summons, the testator, in the events which happened, bequeathed certain investments upon trust for his sons, Francis William Coleman, Percy Coleman, Sydney Francis Coleman (who was also, with the Public Trustee and the testator's daughter Elizabeth Sophia Coleman, since deceased, appointed executor of the will) Alfred Edgar Coleman and Walter Coleman, in equal shares and directed that the share of Walter should be held upon certain trusts thereafter mentioned. The testator left the residue of his property equally between his said five sons, Walter's share to be held subject to the directions and provisions thereafter declared, which were that the trustees should invest the share and during Walter's life should apply the income

as to the whole or such part thereof as the trustees or trustee in their absolute discretion think fit for the maintenance or benefit of the said Walter Coleman and any wife or children of his or the maintenance or benefit of any one or more of such persons to the exclusion of the others or other in such manner and form in every respect as the trustees or trustee may in their absolute discretion think fit.

After the death of Walter the trustees or trustee were to :

hold the income of my son's share during the lifetime of any widow whom he may leave upon trust to exercise the said discretionary trust in favour of such widow and of all or any children of the said Walter Coleman or any one or more of such persons to the exclusion of the other or others and after the death of such widow the capital and income of my son's share shall be held upon trust in equal shares for the children of my said son who being sons or a son attain the age of 21 years or being daughters or a daughter attain that age or marry and in default of such children or child in trust for my said sons Francis William Coleman, Percy Coleman, Sydney Francis Coleman and Alfred Edgar Coleman absolutely.

The said five sons of the testator and his daughter Elizabeth Coleman

all survived him and accordingly constituted his next of kin according to the statutes of distribution, but Elizabeth Sophia Coleman died on Dec. 7, 1928, intestate and letters of administration to her estate were granted to her brother Sydney Francis Coleman.

Walter Coleman died on Aug. 19, 1934, and a grant of administration *pendente lite* of his estate was granted to the defendant Reginald Leonard Janes. Walter Coleman left a widow Catherine Coleman, one of the defendants herein, and three children, Francis Lloyd Coleman, John Owen Coleman and Humphrey Coleman, of whom Humphrey Coleman died on Oct. 19, 1918, John Owen Coleman attained the age of 21 and died on July 19, 1928, by will appointing the said Francis Lloyd Coleman executor thereof, and Francis Lloyd Coleman died on Jan. 1, 1935, having by his will appointed the defendant Catherine Coleman executrix thereof.

By a mortgage dated Jan. 31, 1933, Francis Lloyd Coleman assigned to the defendants, the Legal and General Assurance Society, Ltd., all his reversionary interest under the will of his grandfather, the testator.

The questions raised by the summons were whether upon the true construction of the will and in the events which had happened (1) the trust declared to take effect after the death of Walter Coleman in respect of the share of the testator's residuary estate thereby settled upon trusts for the benefit of his widow and all or any of his children failed to any and what extent by reason of infringing the rule against perpetuities or otherwise; (2) the further trust thereby declared to take effect after the death of the widow of Walter Coleman in respect of the said settled share failed to any and what extent by reason of infringing the rule against perpetuities or otherwise. In the event of the above trusts or either of them being held to have failed the summons then asked for directions as to the persons for whom the trustees ought to hold the capital and income of the said settled share.

Hubert A. Rose, for the plaintiff, stated the facts.

Geoffrey N. Cross, for the defendant Reginald Leonard Janes, the legal personal representative of Walter Coleman: The discretionary trust during the life of the widow, although a bare life interest to her would be good, is bad on the principle laid down in *Re Blew*, *Blew v. Gunner* (1), because it is really a long series of contingent interests. That being so the gift to Walter's children is also bad, as being an unsupported remainder: see *Re Backhouse*, *Findlay v. Backhouse* (6). I rely also on *Re Abbott*, *Peacock v. Frigout* (3) in which STIRLING, J., states the rule that any limitation depending and expectant upon a prior limitation which is void for remoteness is invalid, and on the judgment of LORD ST. LEONARDS in *Monypenny v. Dering* (12).

CLAUSON, J.: He was dealing with a devise of a legal estate in freeholds. This is a pure question of construction. You must satisfy

me that the testator did not intend Walter's sons to take the capital unless during the life of any widow Walter may have left the trustees would have been justified in paying her the income.

Cross : STIRLING, J., applied the rule in a case where the gift was one of personalty and he considered that LORD ST. LEONARDS was laying down a general principle, the origin of which may have been the presumed intention of the testator, but which has now become a rule of construction. Where a testator gives a prior interest and then a remainder, he must have intended the capital was not to go unless the income went in accordance with his will. You cannot have a gap.

CLAUSON, J. : If your argument is sound *Re Thatcher's Trusts* (4) ought not to have been decided in the way it was, and ASTBURY, J., in *Re Hewett's Settlement*, *Hewett v. Eldridge* (5) ought to have held that *Re Thatcher's Trusts* (4) was wrong.

Wilfrid M. Hunt, for the defendant Catherine Coleman, widow of the testator and executrix of Francis Lloyd Coleman : This gift to Walter's children is not in any way dependent on the previous gift. It is a clear vested gift taking effect in possession on a definite date, the death of the widow. The only difficulty here is the discretionary trusts. All you have to do is to strike out the discretionary trusts. The income can go to anyone you like during the life of this unborn person, which must fall within the period, and the gift over will take effect whether to the issue of the son or to the next of kin.

J. N. Gray for the Legal and General Assurance Society, Ltd. : I am in the same interest as *Hunt*. The statement in JARMAN ON WILLS, 7th Edn., p. 326, is correct in every respect :

As all life interests to persons now in being must take effect, if at all, within lives in being, all such interests would seem to be good, although preceded by interests that are too remote ;

and is consistent with every authority that has been cited, with the possible exception of *Re Backhouse* (6) which everyone seems to have treated as though it were a limitation on land, and which is entirely contrary to the whole trend of authority, and *Re Abbott* (3) which can be explained by inserting the word "contingent" before "limitation." STIRLING, J., in that case was inaccurate if he meant "expectant" and "contingent on" as two different things. All the cases cited by him use the words "expectant and contingent on." They were all in fact contingent remainders. In *Monypenny v. Dering* (12) the emphasis is on "dependent" and in *Re Hewett* (5) ASTBURY, J., used an expression going even further, i.e., "limitation following," as if the fact that it followed after were enough without anything more. Where you have an interest which is quite clearly vested and intended to take effect in any event, the only question being when it takes effect, and it is not in itself in any way beyond the perpetuity rule, then it is obvious that the

intention of the testator is that it is to take effect, and the only way you could say it is not to take effect would be because there was a rule of construction that you are bound to defeat the testator's intention merely because there is one limitation coming after another one. In this case the gift to the sons is in no way dependent on the previous gift. The sons are to take in any event.

The rule in *Lassence v. Tierney* (11) applies. See *Re Shuckburgh's Settlement*, *Robertson v. Shuckburgh* (13). It is quite plain that the testator had no one in mind except the widow and children of Walter and subject to the discretionary trust during the life of the widow, the children take the whole. It is reasonably plain that the testator meant that so far as the gift is not effective it is to go straight on.

J. W. M. Holmes : I appear for the next of kin of the testator, and it is to my interest to say that there is an intestacy, but I think the rule in *Lassence v. Tierney* (11) is too strong for me.

CLAUSON, J. : The testator in this case died on Oct. 26, 1919, having by his will dated July 26, 1918, given his residuary real and personal estate to trustees upon trust for sale and conversion and directed the proceeds to be divided among five sons of whom Walter was one, but the trustees were directed to invest Walter's share and apply the income during Walter's life upon certain discretionary trusts admittedly valid, and after Walter's death to hold the income of his share during the lifetime of any widow whom he might leave upon discretionary trusts in favour of such widow and all or any of his children and after the death of such widow Walter's share was to be held upon trust for Walter's sons attaining 21 and daughters attaining 21 or marrying. Walter died on Aug. 19, 1934, leaving a widow. He had two sons who attained the age of 21 years in his lifetime.

In view of the fact that the first trust of income after Walter's death is a discretionary trust expressed to be exercisable during the lifetime of any widow who may survive him it is clear that the discretion may be exercisable according to its tenor at a date beyond the period of a life in being at the testator's death and 21 years afterwards, since Walter's widow might be a person born after the death of the testator. The discretionary trust would accordingly be invalidated by the rule against perpetuities. This point is covered by the opinion of *WARRINGTON, J.*, in *Re Blew* (1), an opinion which I propose to follow though it is not strictly binding on me, since his opinion on the relevant point was not the foundation of the order which he in fact made.

I am invited to hold that, in view of the invalidity of this trust, the vested gift to Walter's children fails. It is to be observed that it cannot be suggested that the fact that the gift to Walter's children does not fall into possession until after the death of any widow who survives Walter, that is to say until a date which may be later than the expiry

of a life or lives in being and 21 years afterwards, causes that gift to fail. If the gift after Walter's death had been to any widow he might leave for her life, the gift to Walter's children would not fall into possession until after the death of any such widow, but nevertheless the gift to Walter's children would be perfectly good. See as to this *Evans v. Walker* (2).

If it be settled by authority that the invalidity of the limitations of a fund of personalty during the life of Walter's widow, arising from the nature of the trusts of the income during that period, causes failure of a gift of the income and corpus of the fund to the children after the death of the widow, as to which gift it can be predicated, first, that it must necessarily become not only vested but indefeasibly vested within the limits of the rule against perpetuities, and secondly, that it is in no way dependent on or affected by the manner in which the income is applied during the widow's life, I must of course so hold, but no justification in principle was suggested for this result, nor can I think myself of any principle upon which such a result can be based.

My attention was drawn to the language used by STIRLING, J., in *Re Abbott, Peacock v. Frigout* (3), where he said at p. 57 :

It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid.

I was asked to regard this statement as laying down a rule that any limitation, even of an interest which becomes indefeasibly vested within the perpetuity limits, is void if it falls into possession at the termination of a prior interest, which prior interest is held upon trusts void for remoteness. It seems to me reasonably clear, from a perusal of the cases to which STIRLING, J. refers in his judgment, that he had not any such case in mind. The words he uses seem to be in substance borrowed from those used by SIR JOHN ROMILLY, M.R., in *Re Thatcher's Trusts* (4) at p. 370 :

If the limitations are ulterior to or expectant upon limitations which are too remote, they are void also, although made to a person in existence at the date of the will.

In that case SIR JOHN ROMILLY, M.R., was dealing with a gift which, according to the tenor of the will, and disregarding for this purpose (as is of course necessary) the existence of the rule against perpetuities, did not vest indefeasibly within the perpetuity limits. *Re Hewett's Settlement* (5), in which the decision in *Re Thatcher's Trusts* (4) was followed, dealt with a gift to which the same observation is applicable. It was argued that EVE, J. in *Re Backhouse* (6) laid down the suggested rule. I can see no trace that he was intending so to do ; and the cases (*Re Mortimer* (7) and *Re Ashforth* (8)) on which his decision appears to have been based, do not seem to me to lay down any such rule. Reference was also made to an unreported case of *Re Beynon-Winsor* (9), but it was I think con-

ceded that the information available in regard to that case was quite insufficient to enable me to treat it as laying down a rule which, so far as counsel's researches go, seems never to have been formulated in any preceding case.

Since the case was argued my attention has been drawn to the decision, since reported, of my brother FARWELL, in *Re Canning's Will Trusts, Skues v. Lyon* (10). That case is a crucial example of the principle that the mere fact that a limitation follows upon a prior void limitation is insufficient to invalidate it, where the operation of the limitation which it is sought to impeach is (on the true construction of the document creating the limitation and excluding for this purpose all considerations of perpetuity) wholly independent of the earlier trust, though intended to be made subject to it. Where, as in the present case, with which I am dealing, the limitation which it is sought to impeach creates a future interest which becomes vested in interest (though not in possession) within the limits of the rule against perpetuities and cannot in any event be subsequently divested by the operation of the earlier trust, it would be entirely inconsistent with the principle on which the decision in *Re Canning's Will Trusts* (10) proceeds to hold such a future interest to be adversely affected by the invalidity of the trusts which it follows, but of which it is wholly independent.

The question remains as to the trusts upon which the income of Walter's fund is to be held for the period of the life of his surviving widow. On the frame of the will having regard to the principles recognised in *Lassence v. Tierney* (11), the share is in my judgment to be treated as Walter's share subject only to such restrictions as to the mode of enjoyment as may be operative, and accordingly the income during the period in question ought, in my judgment, to be treated as forming part of Walter's estate, and I will so declare.

Subject to any observations which counsel may wish to make it would seem that the costs of all parties as between solicitor and client should be paid out of the capital of Walter's share.

Solicitors : *Hanbury, Whitting & Ingle* (for the plaintiff and the first four defendants) ; *Walter Crimp & Co.*, agents for *Stanley Richards & Co.*, Paignton (for the fifth defendant) ; *Jaques & Co.*, agents for *Robyns-Owen & Son*, Pwllheli (for the sixth defendant) ; *Lawrence, Graham & Co.* (for the defendants, the Legal and General Assurance Society, Ltd.).

[Reported by C. M. YOUNG, Barrister-at-Law.]

G. J. DAWSON (CLAPHAM) LTD. v. H. & G. DUTFIELD.[KING'S BENCH DIVISION (Hilbery, J.), **May 11, 12, 1936.**]*Sale of Goods—Sale for cash and part exchange—Failure to exchange—Remedy seller.*

The plaintiffs sold two second-hand motor lorries to the defendants for £475, as to £250 of which they were to be paid in cash, and as to £225 of which they were to receive in part-exchange two other lorries, provided that the latter were delivered within a month. The cash was paid, but the purchaser failed to deliver the lorries :—

HELD : this was an entire contract of sale, in which the defendants had a right to discharge £225 of the purchase price by the delivery of the lorries within a month ; but upon their failure to do so, the plaintiffs were entitled to sue for the remainder of the purchase price as a debt due. The plaintiffs' remedy in such a case is not an action of detinue for the detention of the lorries, but an action for the balance of the purchase price.

EDITORIAL NOTE. The transaction in question here is a comparatively common one in practice and this case considers the matter in most of its legal aspects. The sale of second-hand goods is not the subject of much authority, and the consideration of the nature of a contract of sale for a fixed price in money and other goods, if not a matter of first impression, has certainly not been considered in any reported case of recent times.

FOR THE LAW AS TO SUCH SALES, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, p. 109, note (c), and FOR THE CASES, see DIGEST, Vol. 39, p. 406, Nos. 410, 411, and p. 647, Nos. 2421, 2422.

ACTION for the balance of the purchase price of goods sold and delivered. The defence was that the sale had been abrogated by a subsequent agreement.

The facts and arguments fully appear in the judgment.

Roy E. Borneman, for the plaintiffs.

R. M. Wilson, for the defendants.

HILBERY, J. : This is a troublesome case ; troublesome not because of difficulty in ascertaining the principles of law which are applicable, but because of the business relations between the parties. They left, to a great extent, the details of the transactions loosely expressed or not expressed at all, in the belief that they would have no difficulty in adjusting any difficulties which might arise. As events turned out they were unable to effect these adjustments. That is why these matters fall to be decided by the court.

The plaintiff company, G. J. Dawson, Ltd., is a company whose shareholding is largely in the hands of Mr. Dawson, the managing director, who gave evidence. He deals in second-hand commercial motor-vehicles. He has a yard in which second-hand motor vehicles purchased by him stand and are kept. The defendants are haulage contractors and from time to time bought second-hand lorries from Dawson. They know his yard and his ways and know him as a man who gives good

value. He struck me as being an honest man and one who would be very likely to do what he could to facilitate transactions and one on whom people can rely. Now a word on the way in which these things are done. Dawson goes about the country, finds lorries which he thinks he can place and sells them to customers just as they are. Customers such as the defendants have their own engineers to examine the vehicles and to say whether they are reasonable purchases. The plaintiffs have in their yards vehicles of all types, some partially dismantled; and parts are often removed from one vehicle and applied to another. It is not unusual for someone buying a lorry as it stands to ask the plaintiffs for parts that he may require—or even to put the thing into running condition. Dawson is a dealer in second-hand vehicles: he has nothing new, and all parties that deal with him are confident that if Dawson says he will get parts for them it means inter-changeable parts which he may have in his possession as part of a second-hand lorry. He does not undertake, and people in that yard do not understand, that he will provide anything new. It would be less than commonsense to suppose that in selling old vehicles—not even in running condition—he would undertake to provide new parts. The defendants are very experienced persons in the matter of motor lorries, and they have a very capable engineer. They were looking for two vehicles—two vehicles, not one. They went with Dawson to see a Leyland vehicle. The price was (if not exactly) nearly decided in conversation. I am sure from the evidence that the discussion showed the price to be about £220. The defendants, however, wanted two vehicles and Dawson had not got a second Leyland. He had, however, a Saurer with an oil engine. Defendants' engineer had a look at the Saurer. They were not keen on a Saurer—but discussion ranged round the possibility of taking the Saurer. Would Dawson take in part exchange two Leyland four-wheelers with trailers? Dawson did not particularly want two Leyland four-wheelers in stock, because, owing to certain legislation, they were not marketable; but Dawson was keen as a dealer to sell the Leyland and Saurer, and an agreement was finally reached. It was agreed that the defendants should take the Leyland and the Saurer for £250 cash and two Leylands and trailers valued at £225. Those actual prices were mentioned. I have no doubt that here there were not two purchases but only one transaction. It is obvious that the purchase price was fixed at £475, to be satisfied by the payment of £250 cash and the delivery of two four-wheel lorries with trailers. This was not the whole of the bargain. The defendants' engineer had seen the Saurer and thought that a great deal should be done to it: he thought it would have to be dismantled. It was understood that the thing was to be sold as it stood. The defendants knew that there was a great deal to be done—and they bargained for a contribution from Dawson to the expense of dismantling.

There could scarcely be stronger evidence that they knew the task they were undertaking, and that the Saurer was not fit for working. They bargained and Dawson agreed to a £15 allowance for dismantling and he agreed also to allow them £20 for the Saurer's tyres. That was the bargain. One other matter was discussed. The tyres on the Leyland four-wheelers were good and Dawson wanted them with no further use. The defendants needed the trailers until the Leyland and Saurer were delivered and they needed overhaul. Therefore it was arranged that the two Leyland four-wheelers be delivered within a month. Two days afterwards Dawson called at the defendants' offices and there the result of the bargain was put into writing and an invoice was drawn. The defendants were debited with £475 for a Saurer and a Leyland. They were allowed £225 for two Leylands, and the two other matters of £20 and £15, leaving a debt of £215. It was agreed that the delivery of two Leyland trailers be taken within a month. The defendants thereupon gave a bill of exchange for £215. I therefore hold that the concluded bargain was the sale of a Leyland and a Saurer for £475 and as part of the purchase and sale there was an agreement to allow £225 for two lorries if they were delivered within a month. There were one or two further allowances and I think that was the whole bargain.

Something passed at a later interview about spare parts. It is quite clear that Dawson said he would let them have spare parts free if he had them. It was no part of the purchase and sale that the plaintiffs were bound to provide spare parts. When the document was made out nothing was said about it. What was said probably was : if spare parts are necessary and the plaintiffs had them, the defendants would be supplied free of charge. It was quite understood between the parties that this referred to chassis parts of other vehicles in the yard. It turned out that the Saurer lorry was in very much worse condition than either the plaintiffs or defendants had believed. On dismantling, it was found to be in a thoroughly bad state, and the cost of repair would be out of all proportion to the value of the result. The defendants rang up Dawson and told him how bad it was and said it was no use to them. Now Dawson was a dealer who had done business with the defendants and did not want to lose their business. It is clear that the Saurer was much worse than it was expected to be and that, the defendants having stated that it would be no use to them, the plaintiff agreed to take it back. I am not satisfied on the evidence that the defendants undertook to do it up for £30, nor am I satisfied that at that date the parties were actually starting a new bargain or intending to make a new agreement. The plaintiffs offered to take the Saurer back, but the defendants wanted another machine. The defendants claim that there was a binding agreement to provide another machine in substitution of the Saurer and they go so far as to claim damages on account of the non-delivery of

that machine by Nov. 1. I am not satisfied that there was such an agreement, certainly not an agreement amounting to a contract.

The first agreement was a complete one and completely executed by the plaintiffs; all that remained to be done was to be done by the defendants. The plaintiffs had discharged their duty. Further the agreement was not a severable one. I cannot say that the defendants' evidence is evidence of a clear intention to take the Saurer out of the bargain and not to affect the rest of the bargain. If they intended this they should have had an adjustment of the original terms. It was of importance that the price at which the Saurer was to be taken out of the agreement should have been agreed, and, as this was not done, I can see no concluded agreement, which could be an agreement in law. There is no evidence of any agreement to put aside the old agreement and treat it as non-existent. There is no more than an expression by the plaintiffs of intention to placate the defendants, an expression of willingness to take back the Saurer and try and find a suitable lorry in order to ease the situation for the defendants. It was the expression of a pious—or I should say business—hope.

Someone must bear the burden of a bad bargain and the loss arising from the fact that the condition of the lorry was so much worse than expected. The thing was sold as it stood, and bought after examination by people who understood that there was much to be done to it. Neither party understood how bad it was. My decision is that the plaintiffs are entitled to the balance of the purchase money in the terms of the claim, owing to the non-delivery of the two Leylands. These had to be delivered within one month and if they had so delivered them, the defendants would have been entitled so to satisfy the purchase price to the extent of £225. They did not do so and there remains £225 as part of the purchase price due to the plaintiffs. The action in such circumstances is not one in detinue, and therefore no demand is necessary. Nor are the plaintiffs bound to claim the lorries. The defendants were merely given the right to satisfy £225 of the purchase price by the delivery of the lorries within one month or thereabouts. Such an arrangement does not deprive the plaintiffs of their right to the purchase price in cash. The defendants have not delivered and there must be judgment for the plaintiffs for the balance of the purchase price.

Solicitors: *Henry Snowman* (for the plaintiffs); *Garton & Co.* (for the defendants).

[*Reported by* GERALD ABRAHAMS, ESQ., *Barrister-at-Law.*]

**Re FLETCHER'S SETTLEMENT TRUSTS, MEDLEY v.
FLETCHER.**

[CHANCERY DIVISION (Clouston, J.), May 1, 4, 5, 1936.]

Equity—Election—Two claims under marriage settlement—One claim statute-barred but satisfied by legacy in will—Other claim ignored by will.

A testator by a settlement made on his first marriage in 1884 covenanted (i) that he would take out a policy of insurance of £2,000 payable on his death to the trustees of the settlement, and (ii) that he would by his will bequeath to the same trustees all his interest in every copy-right to which he was entitled. The testator never took out a policy of insurance, but by his will he bequeathed to the trustees of the settlement £2,000 in full satisfaction of all obligations arising out of the covenant to effect such a policy, and he left the residue of his property, which included the copyrights, by way of a general bequest to his widow, who was a second wife and not a party to the marriage settlement. The testator died in 1935, and a summons was taken out to determine whether the trustees of the settlement could claim both the £2,000 under the will and an assignment to them of the copyrights or damages in lieu thereof, or whether they were put to their election between the two claims:—

HELD: (i) the covenant applied to all copyrights to which the testator was entitled at the date of his death; (ii) if the trustees claimed the benefit under the will, they ought on the general principles of election to give effect to the whole will, including the testator's plain intention that the copyrights should not go to them, although any remedy upon the covenants in the marriage settlement was statute-barred.

[EDITORIAL NOTE.] The doctrine of election is that a person is put to his election to take under or against a will, where the gift under the will is bounty. A legacy in discharge of a debt is not bounty, but this is the first case that fully decides that a legacy in discharge of a statute-barred debt is bounty and one that puts the legatee to his election.

FOR THE DOCTRINE OF ELECTION, see HALSBURY, Hailsham Edn., Vol. 13, pp. 147-149, para. 132; and FOR THE CASES, see DIGEST, Vol. 20, pp. 403-407, Nos. 1411-1439.]

Cases referred to:

- (1) *Wilkinson v. Dent* (1871), 6 Ch. App. 339; 20 Digest 414, 1477.
- (2) *Pankhurst v. Howell* (1870), 6 Ch. App. 136; 20 Digest 457, 1810.
- (3) *Re Fletcher, Gillings v. Fletcher* (1888), 38 Ch. D. 373; 20 Digest 480, 2045.
- (4) *Re Jupp, Harris v. Grierson*, [1922] 2 Ch. 359; 20 Digest 457, 1812.
- (5) *Williamson v. Naylor* (1838), 3 Y. & C. Ex. 208; 23 Digest 358, 4262.
- (6) *Central Trust & Safe Deposit Co. v. Snider*, [1916] 1 A.C. 266; 20 Digest 479, 2036.
- (7) *Synge v. Synge*, [1894] 1 Q.B. 466; 42 Digest 535, 965.

ADJOURNED SUMMONS for the determination of questions arising out of the marriage settlement and will of Joseph Smith Fletcher, deceased. The testator who died on Jan. 30, 1935, and whose will was dated Mar. 24, 1927, had on Dec. 3, 1884, entered into a marriage settlement on the occasion of his first marriage to Annie Busfield. By that settlement he covenanted (i) to effect a policy or policies of insurance in the names of the trustees of the settlement upon his own life in the sum in the aggregate of £2,000;

(ii) by his last will or some codicil thereto to bequeath to the trustees of the settlement all his interest in every copyright to which he was entitled. On this second covenant a question arose on the construction of the settlement as to whether this provision referred to copyrights to which the testator was entitled at the date of the settlement or at the time of his death.

The persons beneficially entitled under the settlement on the death of the testator and his wife Annie Busfield were the issue of the intended marriage, whether children or remoter issue, in such manner as the testator and the said Annie Busfield or either of them should appoint. The testator had two sons by that marriage, both of whom predeceased him, the elder Wilfrid leaving a daughter Joan Fletcher, the first defendant, and the younger Leo, leaving a son, John Leo Fletcher, the second defendant, who, however, on the evidence, his Lordship found to be illegitimate and incapable of claiming under the settlement. By his codicil, dated Oct. 10, 1931, the testator purported to exercise his power of appointment by appointing one moiety of the settlement funds to his granddaughter Joan Fletcher absolutely and the other moiety on certain trusts for his grandson John Leo Fletcher. The testator never took out any policy of insurance as provided for by the settlement, but by his will he bequeathed the sum of £2,000 to the trustees of the settlement,

such sum to be in full satisfaction and discharge of all obligations arising out of the covenant by me contained in such settlement to effect in the names of the trustees a policy or policies of insurance upon my own life in the aggregate sum of £2,000, such sum so bequeathed to be held by the said trustees upon the trusts declared by the said settlement in respect of the moneys to be received from such policy or policies.

The residue of his property real and personal was given absolutely to his second wife, Rosamund Grant Fletcher, the third defendant, if she should survive him, which event happened. There was one son of the testator's second marriage, John Valentine Fletcher, the fourth defendant. The main question to be determined was whether the plaintiff, the sole surviving trustee of the settlement, as trustee of the £2,000 legacy or the persons beneficially interested in such legacy were put to their election between (i) their claims under the settlement in reference to the testator's interests in copyrights, and (ii) their claim to an interest in the said legacy.

Wilfrid M. Hunt, for the plaintiff, stated the facts.

J. A. Reid, for the first defendant: This is not a case of election. A person put to election must take some bounty under the testator's will. Here there is none, for the £2,000 is in satisfaction of an obligation, although it is statute-barred. *Wilkinson v. Dent* (1) is to be distinguished from this case because there the legacy would have stood notwithstanding

that the testator had satisfied the obligation. See *Pankhurst v. Howell* (2). Here the legacy is given for the purpose of putting the legatees in exactly the same position as if the testator had insured his life. See *Re Fletcher, Gillings v. Fletcher* (3); *Re Jupp, Harris v. Grierson* (4). It cannot be disputed that the covenant to take out the policy was statute-barred, but an executor is under no obligation to plead the statute of limitations: *Williamson v. Naylor* (5). The law encourages a man to pay his just debts notwithstanding they are statute-barred, and the court will encourage a gift in satisfaction of a statute-barred debt and will treat it as an obligation and not as pure bounty. A legatee to whom the testator is under an obligation is entitled both to take the legacy and to enforce the obligation unless (a) the legacy is expressed to be in satisfaction of the obligation, or (b) there has been in the testator's lifetime some agreement or undertaking to that effect. See *Central Trust and Safe Deposit Co. v. Snider* (6). A testator is presumed to dispose only of his own property and on the same principle *a fortiori* the court will not, unless compelled, construe his will as directing a breach of covenant.

G. P. Slade, for the third defendant: The widow claims an interest in the copyrights under the terms of the will and the trustees of the settlement are put to their election as between the £2,000 under the will and such rights as they may have against the estate under the covenants in the settlement. The effect of *Williamson v. Naylor* (5) on this case is that the testator has directed that there shall be no enforcement of the statutes of limitations. The trustees ought not to be allowed to take advantage of that direction in their favour in the will and take what the executors are bound to pay to them on that footing, and, at the same time, repudiate the other clauses in the will which seek to take away their property. The copyrights are to be regarded as their property because *Synge v. Synge* (7) and *Central Trust and Safe Deposit Co. v. Snider* (6) are authorities for the proposition that a covenant to leave property by will may be enforced by specific performance. With regard to the suggestion that a legatee can enforce an obligation and take a legacy unless the legacy is expressed to be in satisfaction of the obligation or there has been in the testator's lifetime an agreement to that effect, the answer is that it is only necessary to resort to an inquiry whether there is an agreement in the lifetime, if no case of election is on the face of the will, which was the position in *Snider's* case (6), and it is that which distinguishes that case from the present one. It is manifest on the face of this will that the testator intended to deal with the copyrights in a manner inconsistent with the covenants in the settlement, and therefore a case of election arises.

J. F. Bowyer, for the second defendant, John Leo Fletcher.

CLAUSON, J.: A curious point arises here on which I have had

no evidence of any clear authority. The testator by a settlement made on his marriage covenanted that he would take out a policy of insurance of £2,000 payable on his death and keep up the premiums. He also covenanted that he would by his will bequeath to the trustees of the settlement all his interest in every copyright to which he was entitled. On the construction of the settlement, having regard to the recital in it, it is, I think, reasonably clear that that covenant in referring to copyrights, is a covenant to put the trustees in possession on his death of all the copyrights to which he was entitled at the time of his death. He did not take out a policy, and the settlement having been made in 1884 and the death occurring a very great many years after it would seem, on such facts as I have before me, that his covenant to take out a policy would be barred by statute, and would no longer be enforceable.

When he made his will he did not, in fact, leave his copyrights to the trustees of the marriage settlement. He left all his property, in the events which occurred, by way of a general residuary bequest to his widow, who was a second wife, and had nothing to do with his marriage settlement. But on the face of the will it is perfectly plain, by reason of some provisions which he inserts, and which are to be operative if his widow does not survive him, and his property has to go to other persons, that he is intending to deal with all these copyrights as his own. Accordingly the position is this, that the trustees, if they were now to sue his executors upon the policy of insurance would, in the circumstances I am bound to mention, obtain no redress. If they were to claim against the testator's estate that they ought to have the copyrights assigned to them or have damages in lieu, they would be claiming against the provisions of the testator's will.

The testator by his will has inserted a provision by which he bequeathed a sum of £2,000 free of duty to the trustees of the settlement in full satisfaction and discharge of all obligations arising out of the covenant contained in the settlement to effect a policy of insurance. Now under and by virtue of that provision the trustees, if they claim under the will to have it, will receive that legacy in satisfaction of a claim which, being statute-barred, is strictly, as against the executors, of no value. On the other hand it is true that the executors are free, until stopped by an administration order, to pay debts and meet liabilities which are statute-barred. The question is whether the trustees can, at one and the same time, claim this legacy of £2,000 and claim to have either the copyrights assigned to them or damages in lieu of the assignment of the copyrights, notwithstanding that it is clear on the face of the will that the testator is treating the copyrights as his own property, and is disregarding the obligation under which he was placed by the marriage settlement to leave the copyrights, to which he was entitled, to the trustees. There is no doubt about this, that a person claiming something under a will is

put to election to give effect to the will as a whole only if that which is being claimed is bounty, and it is suggested that just as giving a legacy in discharge of a debt is not, as a general rule, bounty, so to give a legacy in discharge of a statute-barred debt is not bounty. Oddly enough, this point never seems to have been precisely dealt with. But in my view I cannot hold that it is upheld. On the principles of election generally I am bound to say to trustees: You may claim the benefit, if you will, of the clause in the will by which the testator provided £2,000 in satisfaction of the statute-barred claim in respect of the policy, but if you do that you must, on the general principles of election, give effect to the will, and give effect to the testator's plain intention that the copyrights shall not go to you, but shall be dealt with as part of his estate, and thus pass under the residuary bequest to the widow. That in my view is what I ought to decide. I therefore declare that if the trustees claim the benefit of the legacy of £2,000 they will thereby be debarred from any claim in respect of the copyrights. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *Field, Roscoe & Co.* (for the plaintiff and for the third and fourth defendants); *Thomas Cooper & Co.* (for the first defendant); *Blyth, Dutton, Hartley & Blyth* (for the second defendant).

[Reported by C. M. YOUNG, *Barrister-at-Law.*]

MACKINNON v. PEATE AND ANOTHER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parc and Goddard, JJ.), **April 24, 1936.**]

Street Traffic—Heavy motor car—Laden weight—"Registered on or after Jan. 1, 1932"—*Motor Vehicles (Construction and Use) (Amendment) Provisional Regulations, 1931, reg. 10 (ii).*

A certain four-wheeled motor vehicle fitted with pneumatic tyres was stopped and found to weigh, with its contents, 13 tons. The owners were charged with having unlawfully caused or permitted the use of a vehicle which did not comply with the Motor Vehicles (Construction and Use) Regulations, 1931, reg. 59. The vehicle had been registered under the Roads Act, 1920, in Sept., 1931. The justices dismissed the information, holding that reg. 59 did not apply to the vehicle as it was registered "on or after Jan. 1, 1932" within the Motor Vehicles (Construction and Use) (Amendment) Provisional Regulations, 1931, reg. 10 (ii). The informant appealed:—

HELD: the Motor Vehicles (Construction and Use) (Amendment) Provisional Regulations, 1931, reg. 10 (ii) applies only to a vehicle which is registered for the first time on or after Jan. 1, 1932, and the justices should have found that the offence charged had been proved.

[EDITORIAL NOTE.] This case deals with the construction of the words "registered . . . on or after Jan. 1, 1932" in the Motor Vehicles (Construction

and Use) (Amendment) Provisional Regulations, 1931, reg. 10 (ii). It was argued that a motor vehicle which had been registered in Sept., 1931, and was therefore a registered motor vehicle on Jan. 1, 1932, came within the regulation, and this argument found favour with the justices. It is clear, however, that the words "on or after" must be read together and that the regulation applies only to a motor vehicle which is registered for the first time on or after Jan. 1, 1932.

AS TO CLASSIFICATION OF MOTOR VEHICLES, see HALSBURY, Supp. to Vol. 27, Street Traffic, paras. 631-635; FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) PROVISIONAL REGULATIONS, 1931, REG. 10, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 24, p. 494, and see also STONE'S JUSTICES' MANUAL, 1936, p. 2129.]

APPEAL by way of case stated by justices sitting at Chester who dismissed an information preferred by the appellant, an inspector of weights and measures in Cheshire.

The information preferred against the respondents charged them with having, on Sept. 20, 1935, unlawfully caused or permitted the use of a certain motor vehicle which did not comply with the Motor Vehicles (Construction and Use) Regulations 1931, reg. 59 as required by the Road Traffic Act, 1930, s. 3.

It was admitted at the hearing that the respondents were the owners of a heavy motor vehicle which had been stopped by the inspector, and weighed with its contents and the weight found to be 13 tons. It was also admitted that it was a four-wheeled vehicle fitted with pneumatic tyres and that 20 miles per hour was painted thereon as the maximum permitted speed.

On the part of the appellant it was contended that the weight transported should not exceed 12 tons under para. 59 of the regulations of 1931, but the respondents contended that the regulation did not apply to this particular vehicle as it was registered in Sept., 1931. By the Motor Vehicles (Construction and Use) (Amendment) Provisional Regulations, 1931, reg. 10 (ii), the total weight of a motor lorry propelled by steam should not exceed 13 tons if fitted with pneumatic tyres and "registered on or after Jan. 1, 1932." The contention was that a vehicle registered in Sept., 1931 was in fact registered "on or after Jan. 1, 1932."

John Marnan for the appellant: The whole question is whether the justices were right in assuming that this vehicle which was registered before Jan. 1, 1932, was entitled to the benefit given to vehicles registered after that date.

Norman Parkes for the respondents: The word "registered" is capable of different meanings and in this particular connection the justices accepted it as a state of having been registered as distinct from the act of registration. That is quite a reasonable interpretation of the word "registered." It is therefore necessary to consider the meaning the Minister attached to the word "registered" when he intended to lay down rules relating to vehicles registered after a particular date. The

word "registered" is ambiguous and it is necessary to see how the Minister himself interpreted the word throughout the regulations. [He referred to reg. 19.]

LORD HEWART, L.C.J. : This case is really too plain for argument. It is quite true that reg. 19 uses the expression "no vehicle registered for the first time" and the words "for the first time" do not occur in the amended regulations. There is a clear contrast between vehicles registered at a particular time, namely, in the case of a vehicle registered before Jan. 1, 1932, and a vehicle registered on or after Jan. 1, 1932. It seems to me to be perfectly clear that the second part of reg. 10 is limited to vehicles as to which the act of registration takes place on or after Jan. 1, 1932. It seems to me that the point is really unarguable and that these justices have misunderstood the case. The contention of the appellant was that this beneficial amendment did not apply to a vehicle registered in Sept., 1931, and that it is not correct to say that the registration takes place on Jan. 1, 1932. It seems to me that this appeal ought to be allowed and the case ought to go back to the justices with a direction that they should find that the offences which had been charged had been proved.

DU PARCQ and GODDARD, JJ. agreed.

Solicitors : *Gregory, Rowcliffe & Co.* for *Geoffrey C. Scrimgeour*, Chester (for the appellant); *Jaques & Co.* for *Cyril Jones & Gittins*, Oswestry (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law]

KULUKUNDIS v. NORWICH UNION FIRE INSURANCE SOCIETY.

[COURT OF APPEAL (Slessor, Greene and Scott, L.JJ.), **Mar. 10, 11, 12, 13, 16, 17 and 19, May 15, 1936.**]

Insurance—Marine insurance—Freight policy—Institute Voyage Clauses—Perils of the sea—Ship and cargo abandoned to salvors—Cost of repair for completion of contracted voyage.

The owners of a steamship claimed under a freight policy subject to the Institute Voyage Clauses (Freight) on the basis of a total loss. Having loaded her cargo, the steamship went ashore and was severely damaged. The hull underwriters and the owners agreed to abandon the voyage upon the hull underwriters paying the owners £7,500 and the ship was abandoned to the salvors. The cargo owners were notified and their underwriters paid as on a total loss of cargo. After repairs the vessel proceeded to a port with 4,250 tons of the original cargo and the vessel was there sold by the salvors for breaking up and was in fact broken up. The owners claimed that the freight was lost by perils of the sea and that they were entitled to recover the sum insured :—

HELD : (i) the owners are prevented in a business sense from performing the freight contract by perils of the sea when no prudent man, if

uninsured, would incur the expense of repairing the ship so as to make it possible to complete the contracted voyage.

(ii) the proper cost of repairs to be taken into consideration is the cost of temporary repairs to enable the contracted voyage to be completed and not the cost of permanent reparation.

(iii) per GREENE, L.J. In estimating the repaired value of the ship and the general average contribution by cargo, the correct values to take are the values at the time of the accident to the ship and not those when the salved ship finally arrives at her destination.

[EDITORIAL NOTE.] This case differs from the recent case of *Carras v. London & Scottish Assurance Corporation* (1) since in that case the ship was prevented from being ready for the voyage at the cancelling date. In the present case the voyage had commenced, but the vessel met with an accident of such a nature that it was held that a prudent uninsured owner would be entitled to abandon the adventure. In considering whether the adventure was frustrated, the amount of repair to be taken into consideration is the repair necessary to complete the voyage contracted to be made and not the repair necessary to make the ship permanently seaworthy again.

AS TO ACTUAL TOTAL LOSS OF FREIGHT, see HALSBURY, Hailsham Edn., Vol. 18, pp. 359-361, paras. 516, 517, and FOR CASES, see DIGEST, Vol. 29, p. 256-260, Nos. 2078-2101.]

Cases referred to :

- (1) *Carras v. London & Scottish Assurance Corporation, Ltd.*, [1936] 1 K.B. 291.
- (2) *Rankin v. Potter* (1873), L.R. 6 H.L. 83 ; 29 Digest 278, 2259.
- (3) *Moss v. Smith* (1850), 9 C.B. 94 ; 29 Digest 259, 2096.
- (4) *Assicurazioni Generali v. Bessie Morris S.S. Co.*, [1892] 2 Q.B. 652 ; 41 Digest 493, 3219.
- (5) *Doyle v. Dallas* (1831), 1 Mood. & R. 48 N.P. ; 29 Digest 262, 2120.
- (6) *Hickie v. Rodocanachi* (1859), 28 L.J. Ex. 273 ; 29 Digest 289, 2351.
- (7) *Hansen v. Dunn* (1906), 11 Com. Cas. 100 ; 41 Digest 493, 3220.
- (8) *Tennants (Lancashire), Ltd. v. Wilson (C. S.) & Co., Ltd.*, [1917] A.C. 495 ; 12 Digest 396, 3216.
- (9) *Taylor v. Caldwell* (1863), 3 B. & S. 826 ; 12 Digest 371, 3093.
- (10) *Jackson v. Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125 ; 12 Digest 386, 3175.
- (11) *Bank Line, Ltd. v. Cupel (A.) & Co.*, [1919] A.C. 435 ; 12 Digest 391, 3198.
- (12) *Re Comptoir Commercial Anversoise & Power, Son & Co.*, [1920] 1 K.B. 868 ; 12 Digest 396, 3218.
- (13) *Embiricos v. Reid (Sydney) & Co.*, [1914] 3 K.B. 45 ; 12 Digest 389, 3188.
- (14) *Geipel v. Smith* (1872), L.R. 7 Q.B. 404 ; 12 Digest 372, 3095.
- (15) *The Savona*, [1900] P. 252 ; 41 Digest 481, 3140.
- (16) *De Cuadra v. Swann* (1864), 16 C.B.N.S. 772 ; 29 Digest 258, 2086.
- (17) *Guthrie v. North China Insurance Co., Ltd.* (1902), 7 Com. Cas. 130 ; 29 Digest 279, 2260.
- (18) *Benson v. Chapman* (1843), 6 M. & G. 792 ; on appeal 2 H.L.Cas. 696 ; 29 Digest 259, 2094.
- (19) *Farnworth v. Hyde* (1866), L.R. 2 C.P. 204 ; 29 Digest 264, 2132.
- (20) *Wild Rose S.S. Co. v. Jupe* (1903), 19 T.L.R. 289 ; 29 Digest 270, 2186.
- (21) *North Atlantic S.S. Co., Ltd. v. Burr* (1904), 9 Com. Cas. 164 ; 29 Digest 271, 2193.

APPEAL by the plaintiffs, the owners of the s.s. "Mount Taygetus," against a judgment of PORTER, J., delivered on June 19, 1935, dismissing

their claim against the defendant company for indemnity under a policy of freight insurance.

The plaintiffs were the holders of a policy, underwritten by the defendant company, under which they were insured against loss of "freight and/or chartered freight," in the sum of £865, which was the amount claimed. The defendants also underwrote some of the hull value and reinsured some of the cargo value.

The policy was subject to the Institute Voyage Clauses (Freight), of which the relevant clauses were as follows :

4. In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered.

5. In ascertaining whether the vessel is a constructive total loss, the insured value in the policies on ship shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

By clause 7 the insurance was warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

The voyage was specified, and included the carriage of grain from ports in South America via the Straits of Magellan to ports in England. Under the charterparty with the cargo owners, the shipowners were to receive a lump sum freight of £8,000 payable in London concurrent with discharge ; only so much advance freight was payable as would cover disbursements of the ship in Chile. On Dec. 23, 1933, the ship struck a rock in the English Narrows and flooded her engine-room. Salvors escorted her to Magallanes. Some of the cargo had been damaged and was jettisoned. The owners made calculations, in consultation with skilled average adjusters, to determine what the relative cost would be of continuing the voyage, of transshipping the cargo, and of abandoning the voyage. They formed the opinion that to continue the voyage would be hopelessly unprofitable. They therefore elected to abandon the ship and cargo to the salvors, and duly gave notice of abandonment. The hull was insured for £25,000, and the shipowners agreed to accept from the hull underwriters (who included the respondents) £7,500 in settlement, the underwriters to accept full liability for the ship thereafter. The cargo underwriters paid a total loss on cargo. The shipowners then claimed that they had suffered a total or constructive total loss of the chartered freight amounting to £7,839, because the cargo had become a total or constructive total loss by a peril insured against and was abandoned to underwriters on cargo, who accepted notice, and that the venture was terminated at Magallanes with the assent of the hull underwriters, the plaintiffs abandoning the ship to the salvors.

By amendment, they pleaded in the alternative that the venture was frustrated. The defendants admitted the policy, but refused to pay indemnity on the ground that, by the Institute Voyage Clauses, in ascertaining whether the vessel was a constructive total loss, the repair value of the ship had to be taken as its insured value under the policies and nothing should be counted in respect of the damage to or the break-up value of the ship. They denied that the vessel or cargo had become a constructive total loss, and that the plaintiffs had suffered a total or constructive total loss of the chartered freight; and said that the loss, if any, was not caused by any peril insured against, but by the plaintiffs' voluntary abandonment of the adventure.

In consequence of the decision of the Court of Appeal in *Carras v. London & Scottish Assurance Corporation* (1), the plaintiffs based their appeal not on the foregoing grounds, but on the ground that the freight was lost by perils of the sea, i.e., they were prevented from performing their freight contract because no prudent uninsured owner would in the circumstances have incurred the expense of repairs necessary to enable the ship to complete the contracted voyage and deliver the cargo. They obtained leave to amend their statement of claim accordingly.

The following figures were agreed:—Cost of temporary repair £19,161, including release of salvors' lien; against which owners could only hope at best to get £6,500 value of repaired ship, £5,278 net freight, £7,201 contribution by cargo—total £18,979. Temporary repair was therefore not commercially practicable.

PORTER, J., in his judgment, while assuming that the cargo would have cost more to bring to its destination than its value when brought there, could not accept the conclusion that the freight was thereby lost. The shipowner was entitled to earn his lump sum freight by delivering such part of the cargo at its destination as retained its identity. In a case like the present a constructive total loss of cargo did not involve a constructive total loss of freight. The plaintiffs had not proved that to free the ship from liability for salvage, to repair her so as to complete the voyage, and to repair her fully, would have cost more than her value when so repaired. They had proved only that her actual value at the port of destination in a state of temporary repair was less than the ship's proportion of the cost of freeing her from her liabilities for salvage, of temporarily repairing her, and of bringing her to her destination. It was therefore not argued that the ship was a constructive total loss, even disregarding her fictitious value of £25,000. The fact that the cargo was a constructive total loss did not matter, provided the cause of its loss did not put an end to the adventure. Freight might be lost if the ship was lost or the cargo could not be delivered; not because the shipowner or the cargo-owner found it otherwise unremunerative to continue the voyage. He therefore dismissed the action. At a later

hearing he also decided that there had been no partial loss of freight.

The plaintiffs appealed against the judgment dismissing their claim in respect of total loss of freight.

H. U. Willink, K.C., and *Cyril Miller*, for the appellants, the shipowners.

C. T. Le Quesne, K.C., and *W. L. McNair*, for the respondent insurance company.

Willink, K.C.: Our case may be summarised thus:—(i) When the contract cargo has been loaded on to a chartered ship, the chartered freight is lost by perils of the sea when the ship is so damaged that a prudent uninsured owner would not repair her and proceed with the cargo, and therefore abandons the voyage. (ii) If in such circumstances he abandons the voyage, the cause of the loss of chartered freight is perils of the sea and not the abandonment. (iii) The facts which he has to prove are: (a) Damage to the ship by perils of the sea; (b) that a prudent uninsured owner would not have proceeded. (iv) A prudent uninsured owner would not proceed if the expense of so doing would exceed the benefit to be gained thereby, *Assicurazioni Generali v. Bessie Morris S.S. Co.* (4). (v) If the expense of repairing the ship to the extent necessary to enable her to reach her port of destination would, on a prudent estimate of the existing circumstances, exceed her value when so repaired, it is conclusively proved that a prudent uninsured owner would not have repaired and proceeded. The value of freight is excluded. (vi) Alternatively, proof of such a state of things is *prima facie* proof that a prudent uninsured owner would not repair and proceed. (vii) Pending freight is not to be considered. (viii) Even if freight was taken into account, the plaintiff here acted as a prudent uninsured owner in abandoning the adventure. (ix) The question of whether the shipowner might have transhipped profitably is irrelevant, or alternatively the burden of proof that he might have so transhipped is on the respondents.

The agreed figures show that it was in the interest of all parties to abandon the adventure. The shipowners exercised the discretion of a prudent uninsured owner not to proceed with an unprofitable voyage. The primary question in the present case is: Did perils of the sea cause the loss of freight? This case should therefore be decided by the criteria established in the *Carras* case (1), viz. (1) The measure is the same as it would be in a question between shipowner and charterer as to whether the owner was entitled to abandon the charterparty (a question not considered by PORTER, J.). (2) The hull policies are quite irrelevant, and constructive total loss in the technical sense, that of the Marine Insurance Act, 1906, is not a criterion of loss of freight. The appellants do not now say that such constructive total loss of cargo as occurred caused the loss of freight.

The shipowner has not, as regards the charterparty, to consider the cost of full repair, but of repairs sufficient to enable the ship to complete the voyage.

The measure of constructive total loss, at common law, is that state of repair which will enable a ship to be a ship, not the repair which will restore her to her previous condition (per BLACKBURN, J., in *Rankin v. Potter* (2)). A charterparty may be ended by frustration, i.e., it disappears by virtue of the implied term without any acts by anyone, on the facts which frustrate it: *Jackson v. Union Marine Insurance Co.* (10). This is analogous to the principle enunciated in the *Bessie Morris* case (4). SCRUTTON ON CHARTERPARTIES, 13th Edn., Art. 30, p. 110, *et seq.*, deals with the two cases together and treats the cause as perils of the sea. Where there is frustration by damage to the ship or loss of the ship, the freight is lost by the perils of the sea and not by any subsequent decision not to exercise an option.

Here, as in the *Carras* case (1), it became in a business sense impossible by reason of perils of the sea to earn the freight; the shipowner may choose to go on, but if he does not, then the freight remains lost, on the principle of the decisions in the *Bessie Morris* (4) and the *Carras* (1) cases. The shipowner is not bound, when the carrying ship has been damaged so that its repair is commercially unprofitable, to forward the cargo in another ship (SCRUTTON ON CHARTERPARTIES, 13th Edn., p. 315).

De Cuadra v. Swann (16) determines the proper measure by which the shipowner should consider expense: whether the repair so as to proceed on the voyage will involve an expense greater than the value of the ship when repaired, together with the freight which would be earned on the voyage. The two matters should both be taken into account. That case decides that a declaration was sufficient, although it did not state that no other ship was available, and that the total loss could be recovered; it was not necessary to say that the goods could not be carried on at reasonable expense in any other ship.

The standard of repair is not that which will reinstate the ship, but that which will enable it to complete the voyage contracted for. The expense comprises all items, including contractual salvage, which are reasonably incurred. The benefit which the owner will derive is, at the end of the voyage, a temporarily repaired ship and a right to freight (*Assicurazioni Generali v. Bessie Morris S.S. Co.* (4)).

The shipowner, in deciding whether to repair or abandon, must act as a prudent uninsured owner. He must take ship as well as freight into account: *Moss v. Smith* (3), *De Cuadra v. Swann* (16) and per COLLINS, J., in the *Bessie Morris* case (4). The standard of repair is temporary repair: *Bessie Morris* case (4) at p. 607 *et seq.*; *Rankin v.*

Potter (2) at p. 153. The owners were here, as prudent uninsured owners, entitled to take into account all the expense to which they would be put themselves if they had decided to go on. The underwriters could have sent out a vessel and brought back the cargo or a part of it, and so earned freight. This was either a constructive total loss of which notice of abandonment was properly given, or actual total loss of freight.

Cyril Miller : The charterparty was here discharged not by frustration but by an excepted peril. The test is whether excepted perils of the sea have made it impossible for the shipowner to carry on the cargo. The shipowner must continue and overcome perils by reasonable expenditure: *Assicurazioni Generali v. Bessie Morris S.S. Co.* (4). The contract is not an absolute one. An owner is under no duty to tranship, but he may do so if an excepted peril operates, and then the cargo owner must pay freight. There is a loss of freight when it is unreasonable either to take the ship on or to tranship. He is not bound to tranship, even as against the freight underwriters; the contract of affreightment is terminated if he elects not to do so. The test of loss of freight laid down in the *Carras* case (1) is whether the charterparty is terminated by an excepted peril. If the initial cause is perils of the sea, then it is irrelevant that the shipowner could have earned freight by transshipping. The test for determining what a prudent uninsured owner would do is laid down in *Guthrie v. North China Insurance Co.* (17). Here the casualty to the ship happened when she was a few miles from the port of destination, and the question was whether it would be reasonable or not for the shipowner to carry on the cargo.

Here, in order to get the ship and cargo away from Magallanes, the shipowner would (according to the agreed figures) have to pay out £19,161. He could only expect to get back £16,476, made up of the value of the temporarily repaired ship, the net freight, and the contributory value of the cargo in January. Even if the higher agreed value of the cargo for May—£7,201—is taken, the total figure, £18,979, is less than the expenditure. Moreover, the salvors were holding out for more than the agreed salvage expenses, and had control of the ship and cargo in their home port. In making these calculations, as in calculating constructive total loss, the shipowner need not consider what he may expect to get back from other interests. Marine Insurance Act, 1906, s. 60 (2); ARNOULD, Vol. 2, p. 1457, para. 1125. This principle entitles him to leave out of account the contribution of the cargo. The owner was entitled to calculate on a basis of temporary, not permanent, repair, for permanent repair would not have increased the value of the ship by more than its cost, and the ratio of sound value to fully-repaired value therefore remains approximately the same. In any view, it was commercially impracticable to carry on this adventure;

the adventure was properly abandoned, and the abandonment was due to perils of the sea.

Le Quesne, K.C. : Carras v. London & Scottish Assurance Corporation, Ltd. (1) is distinguishable. In that case, freight at risk was a chartered freight; here it was freight on goods which had been shipped, and was a lump sum freight, so that the owner would be entitled to hold the whole of the freight if he delivered any part of the cargo. The owners proved a commercial loss of the vessel on a comparison of the cost of the repairs with the ensuing market—not conventional repaired value; here the owners confined themselves to the cost of temporary repairs and the value of the ship after they have been done.

The court has to consider whether, as a prudent uninsured owner, the owner has by reason of the casualty been prevented from carrying the goods to the agreed destination. For the purpose of deciding between owners and charterers, the court should not take account of the freight, but even if it did, then the supervening unprofitableness of the freight due to a casualty covered by the exceptions clause would not justify a claim by the shipowner to escape from the charterparty.

The shipowner cannot prove destruction of the ship in a commercial sense unless he takes account of the cost of permanent repair and the subsequent value of the ship.

A prudent uninsured owner would not decide whether he would abandon the voyage without having regard to the cost of permanent repair. The judgments in *Assicurazioni Generali v. Bessie Morris S.S. Co.* (4), both in the court below and on appeal, are authority for the proposition that a shipowner must take account of the cost of permanent repairs. Those judgments do not, in fact, distinguish between permanent and temporary repair. The courts have always fixed their attention on permanent repairs. In order to recover for total loss of freight, the owner must prove that the vessel is a constructive total loss, or a commercial loss. The use by many of the authorities of the words "constructive total loss" raises a strong presumption that they had in mind repairs which were not merely temporary repairs. In *Benson v. Chapman* (18), the expression (at p. 810): "Where the damage is so great from the perils insured against that the owner cannot put her in a state of repair necessary for her to pursue the voyage" may apply as well to permanent as to temporary repairs. This is also true of all the language used in the higher court, taken as a whole. In *Rankin v. Potter* (2) it is doubtful whether any distinction could be drawn between the cost of repairs necessary to make the ship seaworthy for her long voyage home, and the cost of those repairs which the shipowner would be entitled to take into account as regards the hull underwriters. The standard of repair on a freight policy should be the same as that on a

hull policy: the vessel must be restored to her previous condition. The appellants' argument is unsupported by authority, either in the cases or in the textbooks, that the value of the ship must be estimated on the cost of temporary repairs and her condition after temporary repairs have been carried out.

The test has never been whether a reasonable shipowner would go on with the contract or not, but whether the casualty has destroyed the ship in a commercial sense. Prudence is only material for the purpose of deciding whether a prudent owner would have thought it worth his while to do full and proper repairs to the ship. On that point the plaintiffs gave no evidence. The present calculation gives no ground on which the owners could refuse to go on with their contract with the goods owners. If the calculation has to be taken into account, it should include the full amount of the advanced freight. In *Farnworth v. Hyde* (19) it was said that no regard was to be had, in considering whether the goods were subjected to such expenses as would have made them a constructive total loss, to the freight which would have had to be paid in any event. PORTER, J., took the view that the cost of earning the freight, being an expense which the shipowner had to incur in any event, ought not to be brought into the calculation. That reasoning ought to be applied here, and then the owners could not show that they have been out of pocket. *De Cuadra v. Swann* (16) is distinguishable.

McNair: When the owner has acted as an insured owner and made a profit out of his insurance, the court should scrutinise meticulously the evidence with which it is sought to support the claim that he would have acted in the same way if he had been uninsured. The shipowners' figures here do not show that. The shipowner must show, as a prudent uninsured owner, a preponderating excess of expenditure over profit—substantial and serious loss: ARNOULD, Vol. 2, para. 1120. *Moss v. Smith* (3). The test of a right sale is the test of a right abandonment.

Willink, K.C., in reply: The authorities reveal a general vagueness in the instructions which judges have given to juries on what constitutes a constructive total loss, and many discrepancies in the *dicta*. These fall under three heads: (1) the cost of making the ship navigable as a ship; (2) the cost of making the ship fit for the voyage; (3) would a prudent uninsured owner have repaired the ship? The one test which is never expressed in a single case is the cost of permanent repairs compared with the value of a fully repaired ship.

The principle of permanent and full repair came into existence only in the construction of special policies containing a condition that the insured value of the ship should be deemed to be the repaired value: *The "Wild Rose"* (20); *North Atlantic S.S. Co., Ltd. v. Burr* (21). For constructive total loss at common law the question is whether the ship is lost, irrespective of whether there is a voyage at all. There

is no decided case which lays down that pending freight is to be taken into account in constructive total loss at common law. The ship being prevented, in a business sense, from completing the voyage, the owners were entitled to abandon the charterparty.

Leave was given to the appellants to amend their statement of claim by adding the further or alternative allegation that :

The damage sustained by the "Mount Taygetus" was such that a prudent uninsured owner would not have proceeded with the voyage and was such that to repair the said damage so as to enable the ship to complete the said voyage would have cost more than the value of the ship when so repaired and was such that so to repair the said damage and proceed to earn the freight would have cost more than the benefit to be derived therefrom ;

and to the respondents to traverse this allegation.

May 15. The following written judgments were read :

SLESSER, L.J. : The facts material to a determination of the present appeal are as follows : the plaintiffs were the owners of a steamship called the "Mount Taygetus" ; they claim under a freight policy dated Nov. 22, 1933, from the defendants on the basis of total loss of freight. The voyage insured is expressed in the policy to be from Liverpool :

to any port or ports in the Bristol Channel whilst there and thence to Rio de Janeiro whilst there and thence in ballast (via Magellan) to grain ports on the West Coast of South America whilst there and thence (via Magellan) to any port or ports in the United Kingdom and/or on the Continent of Europe (not north of Hamburg inclusive) and/or in the Mediterranean and/or Adriatic Seas or held covered. With leave to call touch and/or stay as required.

The sum in question here is £865, part of a total sum insured of £8,000. The subject-matter covered by the policy is the carriage of grain, etc., of the amount of 7,000 to 8,000 tons under a charterparty dated Nov. 2, 1933, from four free loading ports on the West Coast of South America to four United Kingdom ports. The policy was subject to the Institute Voyage Clauses (Freight), and contained the familiar clause that in ascertaining whether the vessel is a constructive total loss, the insured values in the policies on ship shall be taken as the repair value and nothing in "respect of the damaged or break-up value of the vessel or wreck shall be taken into account" ; which clause was recently considered in relation to a freight policy in the case of *Carras v. London & Scottish Assurance Corporation* (1). The insured value on the hull policy was £25,000. The charterparty, which I have mentioned, contained the exception that the steamer was to be in no way liable for perils of the sea. The steamer completed her loading of cargo on the West Coast of South America on Dec. 16, 1933, and sailed for the United Kingdom from a fourth port where she bunkered on Dec. 19. On Dec. 23, while in the Straits of Magellan, she suffered casualty and went ashore on Memphis Rock. There she remained until fourteen days later,

when she was taken off by the Magallanes Salvage Company. By them the steamer was brought under her own steam to Magallanes, arriving on Jan. 13, 1934. The salvage company had agreed with the master on terms of "No cure no pay" that for this service £11,000 should be paid in the event of success, a further payment claimed not exceeding £9,000 to be the subject of arbitration. On Feb. 5, 1934, the hull underwriters and the plaintiffs agreed to abandon the voyage on the terms that the hull underwriters should pay the plaintiffs £7,500, and the ship was abandoned to the salvors. The cargo owners were notified that the adventure was at an end and some 100 tons of cargo were jettisoned; the cargo owner accepted the notice and their underwriters paid as on total loss of cargo. Repairs to the vessel were then carried out by the salvors to enable her to proceed to a Continental port, and she sailed for Rotterdam in May, 1934, with 4,250 tons of her original cargo. At Rotterdam she was sold by the salvors for breaking-up and was, in fact, broken up.

The claim of the plaintiffs on the policy as for a total loss of freight was originally advanced in a manner different from that which has been argued in this court. In the pleadings the plaintiffs contended that they had suffered a total or constructive total loss of the freight because either the steamship cargo had become a total or constructive total loss by a peril insured against and was abandoned to underwriters on cargo who accepted notice of abandonment and that the venture was terminated at Magallanes, and with the assent of underwriters on hull, the plaintiffs on Feb. 5, 1934, through their master, abandoning the steamship to the salvors; or, by way of amended plea, it was contended that the venture contemplated by the charterparty was frustrated. On neither of these grounds did the plaintiffs found their present appeal, but rather upon the footing that the freight was lost by perils of the sea; which, they now contend, if proved, is sufficient for their purpose. This change of front, they say, has been occasioned, at any rate in part, by the decision in this court in *Carras v. London & Scottish Assurance Corporation* (1), which decided that when it was clear from the facts that a freight contract between the shipowners and the charterers was discharged by perils of the sea, it was not material to consider whether the vessel was a constructive total loss, though the question to be solved might involve the ascertainment of some facts which would fall to be determined when a claim was based on a hull policy. We thought, having regard to all the circumstances, that the appellants should not be precluded from arguing this appeal on the ground which they now advance, and the court admitted an amended statement of claim to enable them so to do. This amended ground upon which the appellants contend under the charterparty and freight policy that the shipowner has been prevented in a business sense from performing the freight contract by

perils of the sea is that when the agreed figures in the case are considered, it appears that no prudent man, if uninsured, would, in such a state of things as is here disclosed, incur the expense of repairing the ship so as to make it possible to complete the contracted voyage and deliver the cargo.

The only cost of repairs which was agreed between the parties before and at the trial was "temporary repairs to enable the voyage to be completed," and it is contended by Mr. Le Quesne that such an agreed basis of cost of repair is not a right criterion, but that the cost of repairs sufficient to put the ship back into the position in which it was before the casualty, or at any rate a cost sufficient to effect permanent reparation, should be the sum to be taken into account as part of the necessary expenditure as the result of that casualty; and that against that sum should be set the value of the ship so fully repaired; no consideration to be given to the sum which would be earned in freight by the contracted voyage. He points out that neither by agreement nor by evidence was the cost of such full repair to the ship determined before the learned judge, and that it is not possible nor right that, at this stage, such an enquiry should be entered into. On the other hand, if the cost of repairs sufficient for the voyage, which have been called "temporary repairs," are to be taken as the only necessary element in considering whether a prudent uninsured owner would incur them, there can be no doubt on the agreed figures that no prudent uninsured owner would have ordered such repair. The sum which the shipowner would have to expend on a basis of temporary repair, including the release of the salvors' lien, would be £19,161; whereas, at the highest, all he could hope to get would be £6,500, the value of the so temporarily repaired ship, together with the net freight, if that be properly included, of £5,278, and, at the most, a contribution by the cargo towards the repair of £7,201, making £18,979 in all, a sum less than the necessary expenditure. If the freight be excluded from the benefit of his repair and if the cargo's contribution be assessed on the value of the cargo in January at the time of the casualty, rather than in May, the sum to be credited to the shipowner would be only about £11,200; if the freight be included and the cargo estimated as in January the sum would be £16,476—in any event, therefore, the temporary reparation would not be commercially practicable. The proportions attributable to this particular cargo produce a similar result.

In these circumstances, excluding all matters which have now been decided in this court in *Carras v. London & Scottish Assurance Corporation* (1), the question for determination, though a difficult one, lies within a narrow compass. What has to be decided is whether, in making the computation, the costs of repairs sufficient to complete the voyage are to be the subject of consideration, or the costs of repairs sufficient

permanently to restore the ship, regardless of the specific obligation of carriage. In my view, when the matter is fully considered, it emerges that this question has already been decided by authority. To quote the speech of LORD CHELMSFORD in *Rankin v. Potter* (2) (also a case of freight insured, where it was stated that the cost of repairs were those necessary to make the ship seaworthy and enable it to bring home its cargo, page 85) at page 155 :

A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight . . . the only question is whether, by the perils of the sea, the ship was so damaged . . . during the term of the policy, as to be rendered incapable, unless sufficiently repaired, of performing the voyage . . . for which she was chartered.

And again, later, he refers to :

a further admission stated in the report of this case in the Court of Common Pleas, viz., that the cost of repairing the vessel at Calcutta so as to make her seaworthy for carrying a cargo to England would have exceeded the value of the ship when repaired,

and gives judgment upon that assumption. LORD HATHERLEY speaks to the like effect at page 163, in agreement with the views of BRETT, J., and BLACKBURN, J., at pages 104 and 117.

In the whole of the authorities, which are so fully discussed by my brother GREENE, L.J., that I do not mention them in detail, I can find no suggestion of any standard of the extent of repair on a freight policy, whatever may be the case of hull policy, other than that stated by LORD CHELMSFORD and the other learned Lords and judges in *Rankin v. Potter* (2) : namely, that of sufficient repair to perform the voyage for which the ship was chartered. In *Moss v. Smith* (3), where action was brought both on a policy on ship and on chartered freight, MAULE, J., speaking of the freight policy, said (page 103) :

The only loss in question here, is a loss of freight as incident to the loss of the ship. If the ship was irreparably damaged—considering the damage to be irreparable in the view I have mentioned, and which I take to be well established—to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only as that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning,

the test being whether the vessel could be commercially repaired so as to bring home the whole or part of the cargo. And at page 106 in the same case, CRESSWELL, J., said :

Now, what is the contract of the underwriter ? That the owner shall not be deprived of his freight by perils of the sea. The jury have in this case found that the ship might have been repaired at an expense such as a prudent owner, uninsured,

would have incurred, regard being had to the value of the ship, and that the ship would have been enabled by that expenditure to earn the freight.

WILDE, C. J., at page 109, speaks of the "known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner uninsured would incur"—he refers to the evidence on behalf of the plaintiffs "of what would have been the cost of the repairs which would have been necessary to enable the ship to pursue the voyage." These *dicta* all indicate that, in freight insurance, the temporary expenditure necessary to earn the freight—that is, to complete the voyage—is the true criterion. In *Assicurazioni v. Bessie Morris* (4), LORD ESHER, M.R., speaks, at page 658, of "the cost of the repairs necessary to enable her to complete the voyage contracted for"; and BOWEN, L.J., at page 660, of the vessel being "put into a condition fit for the performance of her voyage." In the light of these weighty and almost unanimous *dicta*, I do not find it necessary to go further into this matter. Had I to decide the matter free from past authority, looking at the substance of the contract, which is to carry the freight, I should have come to the same conclusion as have so many learned judges, but in this case I feel that I can rest securely, apart from any fresh consideration, upon clear and binding authority. This appeal succeeds, with costs here and below.

[The following judgment was read by SLESSER, L.J.]

GREENE, L.J.: The substantial question which arises for decision upon this appeal is whether the appellants are entitled to recover as for a total loss of chartered freight, upon proof that the cost of temporary repairs to the vessel, sufficient to enable her to carry her cargo to its destination, would have exceeded her repaired value; or whether, in the absence of proof that the cost of permanent and complete repairs would have exceeded the repaired value of the vessel, the appellants are bound to fail. In so stating what appears to me to be the substantial question in issue, I do not forget the argument which was addressed to us on behalf of the appellants: that the test to be applied is a more fundamental one than a mere comparison between the cost of repair and the value of the repaired vessel, and involves, or at any rate permits, a general inquiry as to what a prudent uninsured owner would have done in the circumstances, an inquiry upon which other matters of evidence may be relevant in addition to the factors of cost and value. Upon the view which I take of this case, it is not necessary to decide whether or not this argument is well founded. In this judgment I use the phrase "cost of repairs" as including the cost of freeing the vessel and her cargo from the salvors' lien and other expenses necessary to be incurred to enable her to proceed on her voyage, as to which there is no dispute, less the estimated general average contribution to be made by the cargo.

There is a subsidiary question whether for the purpose of the calculation the shipowner should be debited with the freight which would have been earned, and, if so, whether it should be the gross freight, including the portion prepaid, or only the unpaid portion of the freight less the cost of earning it. I will deal shortly with this subsidiary question at the conclusion of my judgment.

It is remarkable that there should be no authority directly covering the question whether permanent or temporary repairs are to be taken as the test in such a case as the present. The reason may well be that in many cases the distinction is in practice an academic one. If a vessel, when temporarily repaired, is worth less than the cost of the temporary repairs, it is likely that her value, if permanently and completely repaired, would be less than the cost of so repairing her, particularly if to that cost is added the cost of the temporary repairs necessary to enable her to reach a port where she can be permanently and completely repaired. Moreover, in former times, if a vessel suffered serious sea damage at a distant place, the repairs necessary to enable her to reach home would in many cases have been of necessity repairs of a permanent and complete nature. But in the present case the distinction is of vital importance, and the question falls directly to be decided.

Upon the principle recently reaffirmed by this court in the *Carras* case (1) a shipowner—in which expression I include a charterer by demise—is entitled to claim against his freight underwriter as for a total loss of freight if the vessel suffers such sea damage as will free the shipowner from his obligation under the contract of affreightment to carry the cargo to its destination; provided, of course, that the cargo is not in fact carried either by the shipowner himself or by abandonees of ship so as to earn the freight. There may be, perhaps, a further exception where transshipment, although optional to the shipowner, is a reasonable and practicable course. But for the purposes of this judgment I can disregard these exceptional cases, which do not affect the principles involved. Where the damage can be repaired and no question as to the cost of repairs arises, no difficulty is presented, although in discussing the principles involved, I shall have to examine that case. The difficulty arises where the cost of repairs would be so unreasonable as to justify the shipowner in refusing to incur it, in which case the vessel is said to be lost in a commercial sense. In considering this question of commercial loss in a case between shipowner and freighter, it appears to me that nothing but confusion results if it is treated as the same question as that of commercial loss as between shipowner and hull underwriter—that is, constructive total loss of ship. It may or may not be the case (I know not) that as a matter of history the conception of commercial loss first appeared in cases between owner and hull underwriter, and that it was afterwards applied to cases between

owner and freighter and owner and freight underwriter. Whether this be so or not is, in my judgment, immaterial. The rule that a shipowner is entitled to be freed from his obligations to the freighter if the vessel is lost in a commercial sense is now well established, and it cannot in my judgment be treated as the same rule, or a branch of the same rule, as that which applies between owner and hull underwriter. It stands on foundations of its own, and its scope and effect must be ascertained accordingly.

There is, indeed, a fundamental difference between the circumstances in which the two rules operate. In the case of shipowner and freighter the rule as to commercial loss operates to excuse the shipowner from performance of a contract. The shipowner's obligation under that contract is to carry the cargo to its destination. If the ship is damaged and yet capable of repair, it is his duty to repair it. The rule as to commercial loss, in cases where it applies, operates to free him from this duty. Whether it be a rule of construction or a rule under which a term is implied in the contract of affreightment, it is a rule which excuses the shipowner from what is *prima facie* his duty, and its scope must in my judgment be determined with reference to this fact. The importance of this will appear later. In the case of constructive total loss under a hull policy, on the other hand, no question of the duty of the shipowner to carry the cargo arises. The contract here is a totally different contract, and there seems to be no ground in logic for assuming that the facts which will constitute a commercial loss for the purposes of the one contract are necessarily the same as those which will constitute a commercial loss for the purposes of the other. If there are analogies between the two cases, they are analogies and nothing more, and must not be allowed to distract the mind from what, as it appears to me, is the correct method of examining each rule: namely, to examine it with reference to the particular type of contract of which it forms part.

I will now proceed to the best of my ability to examine in this way the rule as to commercial loss as between owner and freighter. As a necessary preface to this examination I must first of all offer some observations as to the effect of sea damage in general upon the contract of affreightment. In the first place, the damage to be considered is damage which will excuse the owner from performance of the contract of affreightment. The duty of the shipowner under the contract of affreightment is to convey the cargo to its destination by all reasonable means. Under the relevant exception in the contract he is excused from performing this duty if, and only if, he is prevented from performing it by a peril of the sea. The means by which he is to perform the duty of carrying the goods is the named vessel, subject to the right in certain circumstances to carry the goods by another vessel. If the ship is so injured by a peril of the sea that she is incapable of carrying the goods

to their destination, and cannot by any amount of repair be made fit to do so, the owner will in general be discharged from his obligation under the contract. I say in general, because I can conceive of cases where this result would not follow. For example, if the ship broke her back on a rock at the entrance to her port of discharge and could not be got off, so that she was incapable of carrying the cargo into port, but circumstances were such that the cargo could be unloaded into lighters and brought to port, it may well be that the owner would be bound under his contract so to bring them. Mr. Le Quesne, who appeared for the respondents, agreed that this would be so, and I may point out in passing that, if this view is correct, the case would be one where, although the vessel would be a total loss for the purposes of a policy on hull, there would be no loss of freight under a policy on freight, since the sea damage would not in fact have been sufficient to excuse performance of the contract of affreightment and so cause the owner to lose the freight.

In the next place, it appears to be clear that in the case where the only question is as to the damage to the ship, and no question arises as to the cost of repairs, the test (apart from exceptional cases such as that just mentioned) must be: is the damage such that the ship is incapable of carrying the goods to their destination? There may be cases where the vessel may remain or be made a seaworthy ship for the voyage but cannot be made capable of carrying the particular cargo in question. The facts in *Doyle v. Dallas* (5) suggest a case where this might happen. There the vessel, which had been chartered to carry a cargo of hides from Buenos Ayres to England, suffered damage at Buenos Ayres which necessitated stripping her of her copper. Being a teak vessel she could be and was repaired sufficiently to enable her to proceed to England with some sorts of cargo, but in order to enable her to carry the hides it would have been necessary to re-copper her, which apparently could not be done at or near Buenos Ayres. The vessel was not lost, either actually or constructively, and it was so held in the action, where the claim was on a hull policy. But upon the facts the owners would have been entitled to be discharged from their liability under the charter-party, and they could have recovered under a freight policy. Here again I point out in passing that in such a case there would be no constructive total loss of ship under a hull policy, but there would be a total loss of freight under a freight policy. The case is the converse of that referred to above.

I may summarise what I have said by saying that in my judgment, in cases where the only question is the possibility of effecting the necessary repairs and the question of the cost of repairs does not arise: (1) The shipowner is not excused from performing his contract unless he can show that owing to sea damage the ship cannot be considered a ship for the voyage and for the cargo in question, in the sense that she cannot

be put into a condition to complete that voyage with that cargo ; (2) Even when he can show this he may yet not be excused if, upon the facts of the case, it is possible to get the goods to their destination by reasonable means, e.g., lighters, as in the example taken above. I do not include under this head transshipment and carriage by another bottom, as this is optional to the shipowner ; (3) If he can show that the ship cannot be considered a ship for that voyage with that cargo, he is entitled to be excused, even though the ship may be repaired so as to be a seaworthy ship fit to carry a different cargo for that or a different voyage. If the propositions which I have ventured to formulate are correct, it follows that, in considering the effect of the actual damage, quite apart from any question of the cost of repair, the test by which the position is to be judged is the test of the voyage. And this is, I think, the logical conclusion from the fact that the contract of affreightment is concerned, and concerned only, with the voyage in respect of which the rights and obligations of the parties under the contract arise.

So far I have been discussing the position which arises where repairs to the vessel are or are not possible, without there being any question as to the cost of the repairs ; and the conclusion to which I have come is that the shipowner's duty under the contract of affreightment is, whenever it is practicable to do so, to effect such repairs as may be necessary to enable the vessel to carry her cargo to its destination, no more and no less. If the repairs necessary for this purpose are permanent and complete repairs, those are the repairs which must be carried out. If, on the other hand, temporary and incomplete repairs will be sufficient for the purpose, those are the only repairs which the contract obliges the shipowner to effect, since the completion of the voyage is the only matter with which the freighter is concerned. But the duty to effect the necessary repairs to enable the vessel to carry the cargo to its destination is not an absolute duty. It is subject to this qualification (which for the moment I will state in quite general terms) : that if the cost of the repairs is unreasonably large the shipowner is excused from executing them and is entitled to treat his obligation to carry the goods to their destination as discharged by a peril of the sea. Another way of describing this result is to say that the shipowner is entitled to treat the vessel as lost in a commercial sense through a peril of the sea. If it were not for the fact that this description has the support of authority, I should myself have been inclined to avoid the use of the word "lost," since it appears to me that it is a word which tends to confuse the issue. In particular, it tends to obscure the fact that, as between owner and freighter, the real question is, as it appears to me, not : is the vessel "lost" in some absolute sense, but is she "lost for the voyage so far as regards the goods to be carried" ? If she is not lost for the voyage

so far as regards those goods, there can, I think, be no reason in principle why the shipowner should be excused.

The *prima facie* duty of the shipowner to the freighter being, as I have pointed out, to effect such repairs (whether permanent and complete or only temporary, as the case may be) as will enable the vessel to carry the cargo to its destination, the question whether on commercial grounds of expense he is to be excused from performing this duty ought, in my judgment, on principle to be determined by reference to the cost of the repairs which, on the facts of any individual case, are the repairs which *prima facie* he ought to do. The freighter is not entitled to call on the shipowner to effect repairs beyond what the contract demands in the circumstances of the case. He is, in the case supposed, claiming that the shipowner is bound to repair; the shipowner is seeking to excuse himself by saying that the cost of the repairs demanded by the freighter is so unreasonable as to justify the shipowner in refusing to execute them. On this basis it appears to me logically to follow, once the principle of the exception based on unreasonable cost is admitted, that the only repairs the cost of which it is relevant to examine are those repairs which, on the facts of the case, the freighter is *prima facie* entitled to require the shipowner to carry out. If, in order to carry the cargo to its destination, permanent and complete repairs are necessary, it is the cost of those repairs which must be considered. If, on the other hand, temporary repairs are sufficient for the purpose, the cost of those temporary repairs is the matter to be considered, and the cost of permanent and complete repairs is irrelevant.

I will illustrate my view by contrasting two cases: (1) If temporary repairs will suffice to get the cargo to its destination and the cost of such repairs would be less than the value of the vessel, I do not see why, on principle the shipowner should be excused from carrying out those repairs merely because he can prove that the cost of permanent and complete repairs would exceed the value of the vessel as so repaired. In other words, the vessel in the case stated ought not to be treated as commercially "lost" for the purpose of the voyage, although on one view of the law relating to insurance on hull she may for the purposes of a hull policy be commercially "lost." As an example, I may take the case of a vessel which suffers a serious casualty close to her port of discharge. It may well be that the repairs necessary to enable her to complete the short remaining distance will be less than her value for breaking-up purposes, but that the cost of making her a really seaworthy ship would far exceed her repaired value. I can see no reason in principle why the shipowner should be able to say, in such a case, that he is not bound to effect the repairs necessary to get the ship with her cargo to her destination. (2) If, on the other hand, the shipowner can prove that the cost of effecting temporary repairs sufficient to get

the cargo home would exceed the repaired value of the vessel, I do not see on principle why the freighter should be able to call upon him to execute the repairs merely because he can prove that, when the vessel reached her port of destination and was permanently and completely repaired, her value would exceed the total cost of the repairs. What may happen to the vessel after her arrival at her port of destination and delivery of her cargo, what the cost of subsequently restoring her to her original condition may be, or her value when restored, are matters with which the freighter is not concerned, and I do not on principle see why they should be taken into consideration.

Before turning to a consideration of the authorities which bear upon the question under discussion, I will summarise the conclusions to which my examination of the principle has led me : (1) In all cases where repair is possible, the *prima facie* duty of the shipowner under his contract of affreightment is to carry out such repairs to the ship (whether temporary or permanent and complete, as the case may be) as may be necessary to enable her to carry the cargo to its destination ; (2) This duty is not affected by the fact that as between the shipowner and his hull underwriter, if any, the case may, or would, be one of constructive total loss of ship, a fact which is not relevant to the consideration of the duties of the shipowner under the contract of affreightment ; (3) The shipowner is excused from the duty to carry out the appropriate repairs (whether temporary or permanent and complete, as the case may be) if he can prove that the cost of doing so would exceed the repaired value of the vessel ; (4) A consideration of the cost of repairs which are not the appropriate repairs in the particular case is irrelevant.

I now turn to a consideration of what are admittedly the three leading authorities on this branch of the law. The case of *Moss v Smith* (3) was decided by the Court of Common Pleas in 1850. The action was brought by mortgagees of a vessel of 716 tons against underwriters on two policies of insurance. The first was a voyage policy on the ship valued at £12,000, at and from her port or ports of loading on the Pacific to her port or ports of discharge in the United Kingdom. The second was a policy for £1,000 on chartered freight valued at £4,000, at and from Sydney, New South Wales, to Pacific ports to the port or ports of discharge in the United Kingdom. The charterparty was for a voyage from South America to the United Kingdom with cargo at a freight of £3 10s. a ton. After loading her cargo the vessel began her voyage home, but suffered considerable sea damage and put back to Valparaiso. Surveys were made by surveyors, "who estimated the repairs that would be necessary to proceed to England with her entire cargo," together with expenses of unloading and reloading, at £3,710 5s., "which would exceed the value of the freight, but would be less than the value of the ship when repaired." On the advice of the surveyors the vessel was

sold for £1,734, and the cargo was delivered at Liverpool by other vessels at a freight of £4 15s. and £5 per ton. The purchaser repaired the vessel at an expense of about £240 and sent her with a cargo to Hamburg, where she duly arrived. The plaintiffs claimed under each policy as for a total loss by perils of the sea, the allegation under the count upon the freight policy being that the ship was wholly lost and that thereby the plaintiffs lost the freight.

The direction given by WILDE, C.J., to the jury as stated in the report was: (1) as to the count upon the hull policy, that if the damage was such

that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired,

there would be a total loss of the ship; (2) as to the count upon the freight policy, if the vessel

might have been repaired within a reasonable time, so as to be enabled to bring home the whole of the cargo, there had been no loss of any part of the freight; and that, if she might have been repaired so as to bring home a part of the cargo only, the plaintiffs would be entitled to recover for a partial loss on freight.

Further light is thrown on the meaning and effect of the summing-up by various passages in the judgments. I may refer in particular to the words of CRESSWELL, J., at page 106, and those of WILDE, C.J. (who was the trial judge), at pages 107, 108 and 109. The direction on the first count was not challenged by the appellant. As to the second count, it was argued that WILDE, C.J., had misdirected the jury because he "incorrectly applied to the freight the same test as to repairs which he had applied to the ship," and that the plaintiffs were entitled to recover by reason of the fact that the cost of the repairs necessary to enable the vessel to reach her port of discharge would have exceeded the freight payable under the charterparty. It is, I think, clear from the report that WILDE, C.J., in his direction to the jury applied the same test as to repairs in the case of the freight policy as he had applied in the case of the hull policy. In his direction on the second count he uses the word "repaired" in the same sense as he had used it in the direction on the first count; and in the direction on the second count he introduces the matter of "reasonable time" and does not expressly refer to a total loss of ship or freight. The reason for this is, I think, that in his view, if the jury had found a total loss of ship on the first count, this would in the circumstances of the case have necessarily entitled the plaintiffs to judgment on the second count; whereas if the finding on the first count was for the defendants there could be no question of a total loss of freight, unless, at any rate, the repairs would have taken so unreasonable a time as to cause a frustration of the adventure.

The decision in the case affirmed the correctness of the direction to

the jury and negatived the plaintiffs' contention that the freight was lost because the cost of repairs would have exceeded the amount of the freight. The question which arises in the present appeal did not arise in that case and was not directly discussed. It is to be observed that on the facts of that case the vessel was on any view clearly not a constructive total loss, and as clearly she was not commercially lost for the purposes of the freight policy. It is, I think, true to say that on the evidence in that case (in reference to which the summing-up—and, I may add, the judgments—are to be read; see per MAULE, J., at page 101) the same facts negatived both constructive total loss of ship and total loss of freight. But I cannot read the decision as authority for the proposition that facts sufficient to negative a constructive total loss of ship are always necessarily sufficient to negative a total loss of freight; or the proposition that a total loss of freight cannot be established unless the facts are such as to establish a constructive total loss of ship. In the circumstances of the case both claims were negatived by the same state of facts, a thing which may well happen in many if not most cases which arise in practice. But however that may be, it is to be observed that no evidence was given as to the cost of permanent and complete repairs, the surveyors' estimate being an estimate of the repairs "necessary to enable the vessel to proceed to England with her entire cargo," namely, 850 tons of guano and a quantity of dollars and whalebone, in contrast to repairs recommended by officers of one of Her Majesty's ships as being sufficient to enable the vessel to bring home about 500 tons of cargo. It may very well be the fact that the repairs necessary to bring a vessel of 716 tons from Valparaiso round Cape Horn to England in the year 1844 with her entire cargo would have been the same thing as permanent and complete repairs, but the report does not so state. In the direction to the jury the repairs referred to are such "as to enable her to perform the voyage." MAULE, J., at page 103 says:

However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost.

CRESSWELL, J., says (at page 106):

But, if a ship sustains so much sea-damage that she cannot be repaired so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract,

the contract being the contract of affreightment. The same learned judge proceeds:

The courts of law have also engrafted this qualification upon the contract—that, if the damage which results from a peril of the sea, is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract.

In this latter passage the repairs referred to are clearly, in my view, repairs of the same kind as those referred to in the earlier passage—namely, repairs which will render the vessel “competent to continue the adventure.” WILDE, C.J., at page 107, interprets the finding of the jury (arrived at after his own direction) as follows :

The jury found that the ship was not damaged to such an extent as to prevent her from earning the freight,

and on page 108 he says of his own direction :

The jury were told, that, if the cost of repairing the vessel, so as to enable her to earn the freight, would exceed her value when repaired, in that case she must be considered to be damaged to an extent to prevent her from earning freight.

These passages, in my judgment, show that the court in that case clearly had in mind, as the true test for the purposes of a contract of affreightment (and consequently for those of a policy on freight), that of repairs sufficient to enable the vessel to complete the voyage with her cargo.

The next case is that of *Rankin v. Potter* (2), decided by the House of Lords in 1872. The policy was effected in respect of freight payable under a charterparty made while the vessel was on an outward voyage to New Zealand, under which a cargo was to be carried on the homeward voyage from Calcutta to England. The policy covered the vessel while on the outward voyage to New Zealand and in port there, and the risk covered by the policy in effect was that the vessel would during the period covered by the policy be so injured by a peril of the sea as to prevent her arriving at Calcutta in a fit and proper condition to earn the freight. The vessel was damaged on arrival at Bluff Harbour in New Zealand, but eventually temporary repairs were effected which enabled her to reach Calcutta, where she was surveyed. It is important to see what the evidence was as to the estimated cost of repairs. It is to be found on page 85 of the report, and is as follows :

The surveys and estimates showed that if the repairs really necessary to make the ship seaworthy, and enable it to bring home a cargo, were executed, they would exceed the value of the ship when repaired ; and one paragraph of the case (para. 24) stated, “It is admitted that the sea damage which the ship sustained at New Zealand, during the time covered by the policy, was such as would have justified an abandonment and claim for a constructive total loss.”

I need not examine the opinions of the judges in any detail, but I may point out that BRETT, J. (at page 104), and BLACKBURN, J. (at page 117), clearly to my mind treat the repairs necessary to enable the ship to complete the voyage as the true test. In the present case, PORTER, J., thought that BLACKBURN, J., in the passage just referred to, had applied a wrong test for constructive total loss of ship. Whether or not he was right in so thinking is a question on which I do not propose to embark,

but so far as regards the test in the case of a freight policy, the opinion of BLACKBURN, J., is quite clear and, in my humble judgment, quite correct. He says :

The question between the assured and the underwriter on the chartered freight is, whether the damage can be so far repaired that the ship can be at Calcutta, seaworthy for a voyage round the Cape of Good Hope, without expending on it more than it would be worth,

thus, taking the cost of repairs necessary to complete the voyage as the true test. Moreover, whether or not the view of BLACKBURN, J., as to the position under a hull policy be correct, the contrast which he draws between the two cases does to my mind show that he would not have accepted the proposition that a freighter is entitled to call upon the shipowner to execute the repairs if it appears that the vessel is not a constructive total loss for the purposes of a real or imaginary policy on hull. LORD CHELMSFORD, in his speech, if I read it correctly, takes the same view as to the standard of repairs. He points out (at page 154) that, having regard to the special nature of the policy, the question was

whether the ship had sustained such damage in New Zealand as to prevent her arriving at Calcutta in such a state of seaworthiness as would enable her to be tendered to the charterer in the terms of the charterparty, as being "tight, staunch, and strong, and every way fitted for the voyage" to England.

The damage was in fact suffered in New Zealand ; the extent of the damage and the cost of the necessary repairs were not ascertained until the survey was made at Calcutta, where, as LORD CHELMSFORD says (page 154) :

a survey disclosed the extensive nature of the injuries which she had sustained in New Zealand, and the consequent impossibility of her performing the homeward voyage without such an amount of repairs as would have cost more than what her value would have been when repaired.

On page 155 he says :

A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight. Under this policy, it seems to me that the only question is whether, by the perils of the sea, the ship was so damaged at New Zealand, during the term of the policy, as to be rendered incapable, unless sufficiently repaired, of performing the voyage from Calcutta to England, for which she was chartered.

Again on page 159 he says :

If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and

put into a condition to earn the freight, and the shipowners had declined to take this course, they would have lost the freight not by the perils of the sea but by their election. But the damage being such as to render the repair of the ship practically impossible, the question between the assured and the underwriters on freight must be regarded as if there were no policy on the ship; and then it becomes the simple consideration whether the freight was not totally lost by the perils of the sea, by what must be regarded, in relation to it, as the total destruction of the ship by which it was to be earned.

I venture to call attention to the concluding words of this paragraph. The words "in relation to it" mean, I think, in relation to the freight, and if this construction be right LORD CHELMSFORD is saying that in a case between owner and freight underwriter the question is not the abstract question "must the ship be regarded as totally lost?" but, "must the ship be regarded as totally lost in relation to the freight?", a distinction which I have already ventured to point out in words of my own.

LORD HATHERLEY, on page 164, says :

It is further admitted in the case that the injury was of such a character that no prudent owner would have repaired her for the benefit of the contract which had been entered into as to freight, because, in order to make those repairs, it would have been necessary to expend more than the whole value of the ship; in other words, when it was ascertained what the extent of the injury was, it was found that she was in such a condition that, had the owners been minded to abandon her at the time when the injuries were sustained to those who had taken the policy on the ship (and who must be distinguished from those who had taken the policy on the freight which is now before us), they would have been justified in so doing.

It is true that in adding this explanation he appears to treat the relevant state of facts for the purpose of the freight policy as being the same as the relevant state of facts for the purpose of the hull policy. There is also a passage in LORD CHELMSFORD'S speech on page 155 which suggests that he took the same view. Both the noble and learned Lords are referring to the statement of facts on page 85 of the report which I have already quoted. But whether or not these observations are to be treated as authority for the view that the relevant state of facts in such a case as that then before the House was the same for both purposes, is to my mind immaterial. What is I think material is that each of them treated the fact that the cost of repairs necessary to complete the voyage would have exceeded the repaired value of the vessel as sufficient to produce a total loss of the freight.

The third case is that of *Assicurazioni Generali v. Bessie Morris S.S. Co.* (4), commonly referred to as the "*Bessie Morris*" case. That was a case between shipowner and charterers. The vessel was found to have been capable of being repaired so as to carry what was left of her cargo to London, her port of destination; she was in fact repaired temporarily at Gibraltar, her port of refuge, and carried a cargo from Oran to Garston.

No question as to commercial loss of the vessel arose, nor indeed could it have arisen in view of the circumstance that she was in fact repaired ; but it appears from the judgment of LORD ESHER, M.R., at page 658, that the repairs (which, as already stated, were temporary repairs) were executed at a cost "very far less than the value of the ship," and he adds : "and that, being so, no reasonable shipowner having regard to his own interests would have failed to do the repairs." In the passage immediately preceding, he states the law as follows :

If she had been got off as a mere wreck, as explained by MAULE, J., in *Moss v. Smith* (3), and could not have been repaired, either where she was or at any other place, so as to be able to complete the voyage within any time which could be considered a fulfilment of the contract, she would have been prevented by the perils of the sea from fulfilling that contract, though she might have been able to perform some other voyage. But, in fact, the ship was got off, and she was taken to Gibraltar, where she could be repaired. What is the duty of the shipowner in such a case ? His duty is to repair the ship, if it is possible for him to do so. That the ship in the present case could, in fact, be repaired cannot be denied. But, as MAULE, J., said, in the case to which I have referred, the possibility must be a business possibility. If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her. In the present case the ship was repaired at Gibraltar, and the cost consisted of the expenses of the salvage of the ship and of the repairs necessary to bring her to London. We know that she was repaired sufficiently to enable her to reach Liverpool by a voyage longer than that provided for by the charter-party, at a cost of £750 in addition to the expenses of salvage.

BOWEN, L.J., also applies the test of the voyage. He says at page 659 :

The shipowners' contract was that they would fulfil the specified voyage, unless they should be prevented by the perils of the sea. Their only excuse for the non-performance of the voyage would be, that its performance was prevented by the perils of the sea. The ship went aground ; but, in order to shew that she was prevented from performing the voyage agreed upon by the perils of the sea, she must have become un navigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to incur it. In the present case, so far from the ship being un navigable, or having been treated as such, she was repaired, and was put into a condition fit for the performance of her voyage.

In this passage I read the words "for that purpose" as referring to the completion of the voyage. Again, on page 661 he says :

In the present case, the answer to the contention of the shipowners is, that the ship never was un navigable, that she never was incapable of performing her voyage.

I read these repeated references to the repairs necessary to enable the vessel to complete the voyage at their face value. I see no reason to disregard them or to attempt to explain them away. In my opinion,

they confirm the view which on principle appears to me to be the right one, as explained in the earlier part of this judgment.

I do not propose to burden this judgment, which is, I fear, already too long, with an examination of other authorities. In so far as there may be in other cases indications of a view different to that which (if I have rightly construed them) is to be found in the three authorities which I have discussed, I am content to follow the latter. Nor do I propose to embark on a discussion as to the standard of repairs which ought to be taken into account for the purpose of constructive total loss as between owner and hull underwriter. Any such discussion would, in my judgment, be irrelevant as well as confusing. But before leaving this branch of the case, I wish to say that, although the decision in the *Carras* case (1) did not cover the point raised in this appeal, I find nothing in the judgments which is in any way inconsistent with the view which I have expressed. The point was in terms left open by SLESSER, L.J., and myself, while the reasoning of LORD WRIGHT, M.R., in my respectful opinion, lends support to the conclusion which I have formed. I should perhaps add that one sentence in my own judgment in that case, as reported, appears to suggest that I had formed the view that in the case of constructive total loss under a voyage policy on hull, the appropriate repairs to be considered are not such repairs as would be necessary to make the vessel navigable for the voyage in question. I refer to the second paragraph on the left-hand column of page 142 of the report in 53 Lloyd's List Reports. I should have expressed my meaning better if I had said that on one view of the law this would be so, since, as appears elsewhere in the judgment, I had no intention of expressing any considered view upon the question of what standard of repairs was appropriate to be considered in such a case.

The only other matter to which I wish to refer is the question whether the shipowner is to be debited with some and, if so, what amount in respect of freight. On the figures the position is as follows. The cost of repairs (in the sense in which I have used that expression) was £19,161. The estimated repaired value of the ship, on the basis of January values, was £6,250 and on the basis of May values, £6,500. The estimated general average contribution by cargo was, on the basis of January values, £4,698 and, on the basis of May values, £7,201. If the value of the vessel and the contribution by cargo be deducted from the cost of repairs, the result is January values £8,213, May values £5,460. The total gross freight was £8,000, of which £548 had been paid in advance, leaving £7,452 at risk. The cost of earning this £7,452 was estimated at £2,174, leaving £5,278 as the net freight remaining to be earned. It will be seen, therefore, that if the shipowner were debited with the whole of the gross freight, namely £8,000, on the basis of the January values he would have incurred a loss of £213, whereas on the basis of

the May values he would have benefited by repairing the vessel and completing the voyage to the extent of £2,540. As in my opinion the right values to take on the facts of this case are the January values, the question whether the shipowner ought to be debited with some and, if so, what amount in respect of freight does not arise, and I do not express any opinion upon it.

SCOTT, L.J.: This case raises for decision certain questions of principle left open by Parliament when it passed the Marine Insurance Act, 1906. It is said on what seems to be good authority that the distinguished lawyers who settled the drafting of that Bill were unable to agree upon the law as to insurance of freight, and that that is why the Act says so little about it. Be that as it may, we have enjoyed the privilege of a full review of all the decisions closely or remotely bearing upon loss of freight and of listening to very careful and illuminating arguments from all four counsel. But in the end the result seems to depend on rather simple principles and conclusions affecting, first, the interpretation of the policy, and secondly its application to the agreed facts.

The precise point for decision is not in my view concluded by any of the decided cases, although there are many passages in the judgments in which the path of judicial reasoning has come near to it, and some in which the language used seems actually to cover it. But in no case was the mind of the court directed to the present point as the issue for adjudication, and there does not seem to me sufficient certainty or unanimity of opinion to warrant a decision as upon authority without explicit reliance upon first principles. I therefore propose to approach the problem upon what I conceive to be the principles applicable. In the analysis of marine insurance cases it is often difficult to keep interpretation and application wholly separate, and the present is no exception; but so far as practicable it is helpful to clear thinking to endeavour to do so. It is also important not to forget that most of the law of marine insurance is in essence pure interpretation of the contract contained in the common form of marine policy. We have all got into the mental habit of thinking of it as substantive law, particularly since its codification in statutory shape; but the Act has made no difference in the essence of the legal problem—as is made plain by sects. 1, 30, 87 and 91 (2), and the “Rules for construction of policy” contained in the schedule. It is, as it always was, primarily a problem of interpretation; the Act merely fixed the interpretation which it requires the court to put on the old form of policy unless the special terms of the particular contract vary it. I emphasise the point, because on a difficult question such as that in debate in the present case, it seems to me helpful to keep the interpretation aspect prominently in mind and to remember that we are trying to determine what was the intention of the parties

in respect of loss of freight as disclosed by their written contract, and especially in respect of the events and conditions in which the right to payment for a loss of freight should become operative. The force of the above consideration is accentuated where the claim is for a total loss of freight, as the Act does not vouchsafe the specific aids to interpretation in the case of freight that it does in the case of ship and cargo; see especially sect. 60 on constructive total loss. In this appeal we are only concerned with total loss, actual or constructive, as we are not asked by the appellants to deal with any claim for a partial loss.

The first question in this appeal is one of pure interpretation: what does the contract provide as to the events in which the insurer undertakes to pay the insured sum? The archaic words of our ancient form of marine policy, set out in the schedule to the Act and embodied in the policy sued on, afford little guidance in the way of description or explanation as to the circumstances which the insurer agrees shall constitute a loss for which he has to pay. Indeed, the statutory form is inapt to cover freight at all, although it is habitually used by Lloyd's for insurance of freight by adding written or typed words to the printed form, regardless of grammar, so as to bring in that subject-matter. The policy in the present case is not wholly in the statutory form; it is entitled as a "cargo and freight" policy, and it excludes the usual words of hull insurance; but it is very nearly in common form, and certainly contains nothing to indicate a different construction from that of the statutory form with the words "on chartered freight and/or freight" added in ink or type in such a place as to show that that was to be the subject-matter of the insurance. There is, however, at this stage of English legal history, no room for doubt that the primary bargain intended by the policy before us is simply this: "We the insurers agree that if the assured suffers a total loss of his chartered freight by perils of the sea, we will pay him the whole sum insured"; and if that be a correct paraphrase of the policy language, it is plain that our decision as to whether such a loss has happened in the present case or not will depend chiefly on the correct interpretation of the words "loss of his chartered freight." The second question in the appeal—whether, assuming a loss of the chartered freight, that loss was by perils of the sea, is also in part one of interpretation.

In truth, apart from authority, this appeal depends almost entirely on ascertaining the true purport of the contractual bargain; once that is put into plain English, the broad lines of the application of it to the facts, I think, become clear enough. But the questions of interpretation are not easy, and the surrounding circumstances have to be looked at. There is no doubt on the evidence that the insurance was effected by the assured in order to cover their lump-sum freight of £8,000 payable to them under the charterparty of the s.s. "Mount Taygetus" dated Nov. 2,

1933 ; or that the contract cargo was loaded ; or that the vessel sailed on the contract voyage. Accordingly the words " chartered freight " in the clause, typed into the chief of the attached slips under the head of " Interest insured," must mean the assured's right to earn and receive that particular freight under and in accordance with the terms of that charterparty. We do not know the date of the slip, but there is no doubt that the policy of Nov. 22, 1933, attached to that marine adventure and no other ; and no question as to whether any bill of lading freight or any mere expectation of freight is covered by the policy arises for our consideration. In the result the words " and/or freight " which follow the words " chartered freight " never became operative, and on the facts before us may be treated as irrelevant surplusage. Thus the sole subject-matter of the insurance was the prospective right to receive payment of the £8,000 on due delivery under the charterparty at the contract destination of the contract cargo, or such substantial part of it as should survive the excepted perils of the voyage ; and the contingency against the happening of which the insurance gave protection was the risk of the assured, as shipowner under the charterparty, being prevented by perils of the sea from earning that freight by the carriage to destination of the cargo or such part of it as would entitle him to the £8,000 freight in the ship named in the charterparty. The policy does not say in terms that it is the earning of the freight by the named ship, the " Mount Taygetus," which is insured, but the whole insurance is expressed to be in respect of the " Mount Taygetus," and that ship and no other was the subject of the charterparty to which the policy, for the purpose of defining the subject of the insurance contract, implicitly refers where it describes the interest insured as " chartered freight."

It is necessary to bear these considerations in mind, as they dispose of an argument addressed to us, with which I will deal in a moment, on the general right of a shipowner under a contract of affreightment to tranship cargo into another vessel, carry it to contract destination in the substituted vessel, and then exact payment of the contract freight on the cargo so delivered. In origin this right of transhipment was probably grafted on to the contract of affreightment by the law merchant as an incident already attached by commercial usage : see per MARTIN, B., in *Hickie v. Rodocanachi* (6) at page 274. It was not made the subject of express stipulation in the common forms of either charterparty or bill of lading, so far as I know, but it has for long been treated as an implied term of every contract of affreightment (unless, of course, the express terms of the contract should happen to be inconsistent with it). It has, however, always been regarded by our courts as a liberty allowed to the shipowner and not as an obligation imposed on him. The rule is sufficiently stated in SCRUTTON ON CHARTERPARTIES at pages 314-6,

art. 103, and the cases there cited : see also *Hansen v. Dunn* (7), *per* KENNEDY, J., at pages 102-3. It was urged by counsel for the respondents that if a shipowner can tranship and so earn his freight under his contract of affreightment, he is precluded as against his insurers from alleging a loss of freight under his contract of affreightment, even although the particular ship named in both contracts as the carrying vessel may have been prevented by a peril insured against from completing the voyage. On the facts of the present case we understood counsel on both sides to agree that another vessel could not have been procured for less than £7,000, but in spite of that and certain substantial further expense involved in transshipping the remaining sound cargo, it was contended by counsel for the respondents that the appellants could in the present case have transhipped and were therefore precluded in law from alleging a loss of the chartered freight by perils of the sea. The respondents' general argument as to the proper interpretation of any policy of freight insurance in common form was also founded partly on the implied right of the shipowner under his contract of affreightment to tranship, it being urged that in every case the onus rested on the assured to prove, not only that completion of the voyage in the contract vessel was physically or commercially impossible, but also that transshipment was in the existing circumstances impossible. For both reasons it is necessary to deal with this contention. The answer to it is, I think, plain. In the first place, even apart from the insurance position, transshipment is under the contract of affreightment, as I have already said, a privilege or liberty of the shipowner, and not a duty. In the second place, whatever the position may be under the contract of affreightment by itself, the insurance policy on chartered freight is concerned only with the named ship ; the insurance is against inability to carry to destination in that ship. This is a basic term of the insurance contract, and I think it limits the ambit of discussion upon loss of charterparty freight to performance by the ship named in the policy ; in other words, it is an implied term of the insurance contract that the assured's right of transshipment under his contract of affreightment is to be ignored by both parties. At any rate that is the meaning, in my view, of the policy before us.

Except in clauses 4 and 5 of the attached "Institute Voyage Clauses (Freight)" the policy does not incorporate, or depend on, or refer to any other contract of insurance, whether on hull or on any other subject-matter of insurance, whether effected by the shipowner or by anyone else—for example, the cargo owner. For the purpose of this judgment it is unnecessary to discuss the effect of those two clauses, as the Court of Appeal has recently considered them in the case of *Carras v. London & Scottish Assurance Corpn.* (1), and decided that they are irrelevant to such questions as we have to determine in the present case. The

judgments of the court in that case are, of course, binding on us in the present case, but the reasoning on which they are based covered so much of the ground which we have to traverse here that I desire to add for myself that I not only recognise the binding effect of the actual points of decision there reached, but agree with the reasoning and the opinions incidentally expressed in the judgments of that case, and therefore repeat no part of them; they throw much light on the legal questions involved in or germane to this case. The results of the application of the "*Carras*" principles here are that no other policy has for present purposes any relevance; that no question of constructive total loss of ship in the proper insurance sense of that expression is germane to the present discussion; that this policy must be construed and applied on the footing that the plaintiffs were otherwise wholly uninsured; and that the ordinary test of the prudent uninsured owner is applicable within its proper limits. The plain meaning of the policy being that a loss of the chartered freight will take place and the insurer's obligation to pay the insured amount will arise if the assured is prevented by perils of the sea from earning the freight due under the charterparty, the test of loss under the policy is relegated to the charterparty contract; save that, as I have already pointed out, the policy makes it impossible for the insurer to rely upon the assured's common law liberty under his charterparty of transshipping; the insurer cannot oppose that defence to a claim of prevention by sea damage caused to the named ship.

In considering a total loss of a lump-sum freight it is necessary to bear in mind that where the charterparty provides for a lump-sum freight, a failure of the shipowner to deliver a part of the cargo does not of itself deprive him of his right to be paid the whole of the lump sum, at any rate assuming a substantial part of the cargo to be delivered and the cause of partial failure to have been an excepted peril (see art. 140 of SCRUTTON ON CHARTERPARTIES). The insurance against loss of chartered freight in this case therefore meant that the assured, as owners of the "*Mount Taygetus*," were covering themselves against the risk of their being prevented by perils of the sea from carrying any appreciable part of the cargo to destination in that named ship. The ultimate question for our decision being whether the assured did suffer a loss of their freight by perils of the sea, the test imposed by it is conveniently expressed in terms which closely reflect the particular circumstances out of which the controversy has arisen. Substituting the objective for the subjective—"prevention caused" for "loss suffered"—the issue may without change of meaning be stated quite simply: Were the assured prevented by the strandings and other events described in the agreed statement of facts from carrying the remaining sound cargo to Europe in the "*Mount Taygetus*" and were those events the proximate cause of prevention? The test of "prevention" as of "loss" is, of course,

commercial as well as physical, as was judicially explained in the *Bessie Morris* case (4), applying the principles in *Moss v. Smith* (3), and *Rankin v. Potter* (2). That is not because prevention under a contract of charter-party is for all purposes or always the same thing as a loss under a contract of insurance, but because all commercial contracts must be interpreted in the light of commercial commonsense if effect is to be given to the commercial intentions of the parties, and when a business man thinks or speaks of "prevention" or "loss" in such a context, he has in mind commercial as well as physical causes and criteria. We may therefore read this policy as saying: "If you, the assured, are prevented in a commercial sense by perils of the sea from carrying in the 'Mount Taygetus' to Europe enough of the contract cargo to earn the chartered freight, we agree to pay a total loss." I state the bargain thus without reference to physical loss, as, on the facts of the present case, the assured cannot say that they were prevented by physical causes, for more than half of the cargo was in fact carried to destination in the "Mount Taygetus" after temporary repairs, although at the instance of and by the salvors and not by the assured.

The main difficulty in arriving at the correct interpretation of "commercial prevention" in the question so framed arises from the legal necessity of observing the principle of the law of contract that the prospect of a contract proving financially unprofitable, however certain the prospect may be, is not of itself prevention and is no ground for release from the obligations of the contract. A shipowner may have made an unwise bargain, or the contract may have proved more expensive in performance than he had anticipated; but neither fact entitles him to claim that he is in a commercial sense prevented from carrying out his promise. The law says simply that if he has made what proves to be a bad bargain, that is his misfortune but it does not afford him any excuse for non-performance; and that is because such a release would not be in accordance with the contract, correctly interpreted: see per LORD LOREBURN in *Tennants, &c. v. Wilson & Co.* (8) at page 510. The contractual duty of the shipowner to the cargo owner to repair the ship when damaged at his own cost and regardless of the profit and loss account of the voyage, as stated by KENNEDY, J., in *Hansen v. Dunn* (7) at page 110, is a mere illustration of the general principle. This principle, in my view, rules out the contention that the cost of temporary repairs by itself constitutes any test. The rule expressed in cases like the *Bessie Morris* (4), that in commercial contracts commercial prevention is equivalent to physical prevention, has therefore to be harmonised with this rule of holding a man to his contract though it be financially to his own let or hindrance. Both rules are fundamental, and the solution must transgress neither.

The way of escape from the antinomy, in my view, lies in a third prin-

ciple of the law of contract : that a contract may be intended by both parties to be dependent for their mutual benefit upon some basic condition, such as the continued existence or availability of a particular thing or state of affairs, so that if the condition fails the contract is discharged or, at any rate, becomes unenforceable : *Taylor v. Caldwell* (9), or *Jackson v. Union Marine* (10), or *Bank Line, Ltd. v. Capel & Co.* (11) ; and see also *Re Comptoir Commercial Anversois & Power* (12) per BANKES, L.J., at pages 886-7 ; SCRUTTON ON CHARTERPARTIES, 13th Edn., at page 110, *et seq.*, and the cases there cited. The basic condition under the charterparty here (at any rate with the shipowner's common law of liberty of transshipment excluded from it by the policy restriction of the venture to performance by the "Mount Taygetus" alone) was the continued existence and availability of the "Mount Taygetus" throughout the voyage. If the "Mount Taygetus" should be at any time during the contract voyage rendered by sea perils incapable of completing the voyage within a reasonable time so as to earn the freight, then, whether the incapability was physical or commercial, the basic condition of the contract would be broken and the charterparty contract *ipso facto* discharged, as LORD SUMNER said in *Bank Line, Ltd. v. Capel* (11), at page 454 ; or at any rate each party would have the option of treating the contract as at an end. On that footing it is clear that if the ship as a merchant ship employed in a shipowner's business should be so damaged that as one of his fleet and an asset of his business it would not be worth his while to incur the cost of repair, the ship would be commercially lost and the basic condition would be broken ; the charterer's right to insist on carriage of the cargo to destination, and the owner's to insist on payment of freight, would both lapse. The view that one of the ways, perhaps the main way, in which an actual loss of freight may happen under a freight policy is through the ship ceasing to exist or be available for the earning of the freight, seems to be almost indicated by the language of sect. 3 (2) (b) of the Act ; it is at least in harmony with it. On that footing, delivery in the "Mount Taygetus" at the destination defined by the charterparty of enough cargo to earn the lump sum freight having been prevented by perils of the sea, there would be an actual total loss of freight under the policy.

The first question logically in the appeal is, therefore, whether the facts in evidence are sufficient to establish a commercial loss of the "Mount Taygetus," judged by the charterparty criterion. It was urged by the respondents that no evidence was led by the assured as to either the vessel's repaired value or the cost of permanent repairs, and that such evidence was essential to prove a commercial loss of ship, whether as a constructive total loss under a hull policy or as a commercial loss of the carrying vessel under a contract of affreightment. But the issue is a jury question, and in my view precise figures on that com-

parison are only required if the two figures are likely to be near each other; and in this case I cannot see that they were. The fact that the salvors, when they got the "Mount Taygetus" to Europe, realised the cargo and sold the ship to be broken up raises a presumption that they thought they had no better market for her and that to repair her would not pay. The terrible slump in shipping values which still prevailed at the time is common knowledge. I therefore draw the inference of fact that the cost of permanent repairs, added to the net cost of temporary repairs and other costs to be incurred in getting the vessel to the port of repairs (but including the ship's part of the liability for full salvage claims: that is, the arbitration claim of £14,500, as well as the £11,000, with contributory values assessed as in Jan., 1934), would certainly have exceeded the market value of the ship when repaired. But there are two further aspects. The first is the salvors' lien, reducing the value of the ship to the owner by the figure at which that lien would ultimately be assessed after arbitration. The second is the value of the wreck, which, in considering the comparison in terms of business prudence, has also to be brought in. If so, the conclusion of fact seems to me to be lifted altogether out of the region of doubt.

But even if we assume the possibility of a doubt remaining as to whether, on the facts subsequently known, the assured have quite discharged the onus of proving a commercial loss of their ship, it is important to bear in mind the legal principle that in a commercial adventure, men must know where they are, and be free to take and act on immediate decisions in the light of the facts as known to them at the time, assuming reasonable assurance that they have taken all possible steps to obtain the necessary information: see per SCRUTTON, J., as he then was, in *Embiricos v. Reid* (13), a case where he was dealing with restraint of princes in regard to a charterparty. He cited the views of LUSH, J., in *Geipel v. Smith* (14), and of LORD GORELL in *The Savona* (15), and said:

Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities when at the time they are called upon to make up their minds.

LORD TENTERDEN, C.J., directed the jury in *Doyle v. Dallas* (5), a claim for constructive total loss on a hull policy, in the following terms:

The only question is, whether this amounts to a total loss? The ship is not bodily and specifically lost; but circumstances may have occurred which, according to the law established in cases of marine insurance, are equivalent to a total loss. I think the circumstances in this case will have that effect, if at the time of the sale, that measure, on the sound exercise of the best judgment, appeared most beneficial to all parties. It is not enough that the owner acted honestly in the sale, and intended to do for the best: the underwriters are not liable unless he formed a correct judgment, that is to say, the best and soundest judgment

which could be formed under the circumstances which then existed. Nothing less than this, in my opinion, will make a total loss, while the ship continues in existence.

Although the jury in that case found against the plaintiff, the acceptance by LORD TENTERDEN of the right of the assured to treat the vessel as totally lost, if he honestly came to that conclusion on the information which then existed, embodies the same principle as that expressed by the late SCRUTTON, L.J.

On this principle I think the assured here were in fact entitled to treat the "Mount Taygetus" as lost both on Dec. 28, 1933, when they gave their notice of abandonment in London, and on Feb. 5, 1934, when everybody concerned, other than the underwriters on freight, decided that the adventure must be abandoned and the ship relinquished to the salvors. The dominant facts in the mind of the assured on those dates must have been, first, the salvage position, a lien on ship and cargo for £11,000 certain, and a further claim which on Jan 27, they had put at £14,500, on the terms of the agreement dated Dec. 27, 1933; and secondly the very grave degree of damage involving, as the master cabled, an impossibility of restoration to seaworthiness. In the course of the argument there was much discussion as to whether the voyage rather than the ship was the basic conception to which a loss under a freight policy must be related. It was also said by counsel for the respondents that even if the loss of the carrying ship was (as I think) the dominant condition of the assured's right to recover, yet in considering whether there was such a loss of ship under the charterparty the amount of freight receivable should be deducted from the cost-of-repair side of the comparison before the commercial result could be seen. On this question many passages from judgments were cited to us *pro* and *contra*, including the much-discussed second sentence in the advice of BLACKBURN, J., to the House of Lords in *Rankin v. Potter* (2). If I am right in what I have already said in favour of the appellants, it is not necessary in the present appeal to determine that question of law; but I feel bound to say that it seems to me very difficult to bring in the value of the freight receivable at destination on the assets side of the account without treating the pecuniary outcome of the voyage as the criterion of loss of freight; and that, in my view, is to transgress the principle that a man cannot get out of his contract merely by showing that its result will be financially unfavourable to himself. I recognise that there are many phrases in the old cases—and some in later cases—about loss of the voyage, or of the venture, or fitness of the ship "to complete the voyage," or equivalent words, and many references to freight, but I do not think the trend of actual decisions or even of judicial opinion has been to treat the profitable or unprofitable probabilities of the voyage after a casualty as a test for loss of freight under the policy.

On the other hand, it may well be that, even excluding the operation upon the contract venture of mere delay (which is made an inadmissible consideration in the present policy by clause 7 of the Institute Clauses), the principle of *Jackson v. Union Marine Insurance Co.* (10) and the frustration decisions of the House of Lords during and after the War have a proper application in a case where it can be shown that, although the ship is not "lost," the whole basis of the adventure has been destroyed by a peril insured against; and it may in special circumstances be possible to establish such a case without at the same time transgressing the principle that a contract does not cease to be binding merely because it is, or has become, unprofitable. Indeed, in the present case the information conveyed by cables to the assured in London certainly seemed to invite the inference that the whole adventure had been destroyed; and apart from Institute Clause No. 7 I might have been prepared to apply that inference here. As it is, I express no opinion, even as to the effect of that clause; preferring to rest my judgment on the actual commercial loss of the ship within the meaning of the charterparty, or, alternatively, on the ground that in the circumstances known to the assured at the time their decision to treat it as an actual loss was justified under the charterparty contract and under the policy.

The preceding part of this judgment (except the second paragraph on the first page) was written by me without having read the judgments of my learned brethren, but I have now read them and realise that, although we all reach the conclusion that the assured are entitled to our judgment, my brethren reach it by a different route to mine. Both their judgments express the view that the present position is covered by authority—not, it is true, by actual decision of the precise point, but by such deliberate expressions of opinion and of reasoning *in pari materia* that we ought to follow the line of thought so indicated. Had I taken this view of the judicial passages on which they chiefly rely, I should have felt bound to follow their lead, but I do not. In particular I am not satisfied that the distinction was in those cases being consciously drawn by the various judges whose words they cite, between the two wholly distinct legal positions which I have endeavoured to state: namely (a) no release of the shipowner from the obligation of his contract through his freight contract having by the operation of excepted perils become unprofitable—even ruinously so—and (b) the failure of a basic condition of his obligation, such as occurs when by the like perils either the carrying ship is lost, physically or commercially, and so rendered unavailable for performance of the contract of affreightment according to its terms, express or implied; or the whole adventure is frustrated. Position (a) leaves the shipowner still bound by his duty to deliver the cargo at destination: he cannot say that he is "pre-

vented " by the perils from carrying out his contract or that he has thereby "lost his freight"; he has simply to repair his ship at his own cost and stomach his pecuniary loss as best he may. Position (b), on the other hand, releases him from his contract and entitles him to say: "I have lost the power of carrying out my contract by reason of the contract ship being no longer available, or of the frustration of the adventure; impossibility of performance has supervened by the failure of a basic condition of the contract; the contract is at an end or, at any rate, I am released from my contract obligation in accordance with, and not in breach of, my contract, and am free to act upon the actual business position in accordance with my business interest and to say to my insurer that I have, in the commercial sense of my policy, lost my freight." In particular, in descriptive expressions to be found in the decided cases about the condition of the sea-damaged ship, I do not think that "fitness to complete the voyage" is always intended to mean a condition of less effective repair than that required to restore the ship to a condition of permanent fitness broadly similar to its pre-casualty state.

I agree with both my brethren that the informal statement of salvage and general average expenses jointly prepared by the distinguished average adjusters on the two sides may be treated as a statement of the cost of repairs and expenses incidental to repair, from Magallanes to the point of delivery of cargo at contract destination; and that in the estimate of commercial loss of ship it is all relevant. I also agree with their conclusion that the prudent owner, party to the charterparty, would on those figures certainly have decided not to prosecute the adventure farther if he was free to choose. But I do not accept the position that those figures standing alone satisfy the insurance test of loss of freight, or loss of either ship or adventure as working a loss of freight in the insurance sense. So to treat them seems to me to be equivalent to taking a profit and loss account of the voyage and to concluding that there is a loss of freight under the policy because the charterparty voyage had proved unprofitable. I cannot see any way out of that legal difficulty unless there has been either loss of ship absolutely and not merely relatively to the voyage, or loss of the adventure by frustration. In the present case, as I have already said, I am satisfied that the ship was lost, basing my conclusion upon the inference which, although the issue, as I see it, was not fully discussed in the court below, I think we are entitled as a court of appeal, in the circumstances of the present case, to draw from the facts which are beyond dispute. Had I felt any doubt upon the right inference to be drawn, I should have proposed that the case should be sent back for further consideration; but no further evidence is, so far as I can see, available which could alter the position of fact already made clear.

This being so, I think it is our duty to draw our own inference and not to send the case back.

In the middle of his judgment GREENE, L.J., states as his conclusions of law four propositions. With the first two I agree wholly and without qualification; constructive total loss of ship is in no way the criterion of a commercial loss of the chartered ship within the meaning of the charterparty. But in his third and fourth propositions he expresses the view that in a case like the present, where the repairs necessary to carry the contract cargo to destination fall far short of the repairs necessary to restore the ship to substantially what she was before the casualty, able to keep her class and to be an effective unit in the ship-owner's commercial fleet, the cost of the "temporary" repairs brought into an account such as that appearing in the documents here will turn the balance and produce a loss of the voyage and therefore of the freight within the charterparty contract, or at least within the freight insurance contract. From that view I feel bound, with diffidence but definitely, to dissent, for the reasons which I trust I have made clear in the earlier part of my judgment. I have read with care all the cases cited to us, and a good many more; and a good deal of the text-books on and round the subject, but I do not think it necessary or useful to discuss them in detail. I agree that the appeal should be allowed.

Appealed allowed, with costs.

Solicitors: *Ince, Roscoe, Wilson and Glover* (for the appellants); *Waltons & Co.* (for the respondents).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

PARKER AND ANOTHER v. JACKSON AND ANOTHER.

[CHANCERY DIVISION (Farwell, J.), **March 24, 1936.**]*Mortgage—Transfer of mortgage—No notice to mortgagor—Debt due from original mortgagee to mortgagor—Set-off.*

A firm of solicitors held about £2,000 belonging to the estate of one of their clients. The client had before his death mortgaged certain property to secure a sum of £700. This mortgage was transferred to the then surviving partner in the firm of solicitors. The trustees of the client's estate—the persons entitled to the equity of redemption—gave no directions for the appropriation of part of the £2,000 in discharge of the mortgage. The surviving partner then parted with the title deeds, in return for £700, to another client, who thus became an equitable transferee of the mortgage. No notice of this transfer was given to the trustees until some time later, when the firm of solicitors was found to be insolvent and the surviving partner was made a bankrupt. The trustees thereupon claimed to recover from the assignee the title deeds free and discharged from any claim in respect of the mortgage debt :—

HELD : as the trustees had not joined in, and had had no notice of, the transfer of the mortgage, the transferee took subject to the right of set-off which the trustees had against the transferor, the surviving partner, and were entitled to redeem the mortgaged property without further payment.

[EDITORIAL NOTE. This case, as the judgment says, shows the wisdom in the case of a transfer of a mortgage of securing the concurrence of the mortgagor or those then entitled to the equity of redemption. The transferee otherwise has no means of being certain of the state of the mortgage debt. Here those entitled to the equity of redemption were also entitled to a large sum of money then in the hands of a transferee of the original mortgagee and therefore entitled to set-off the mortgage debt against that sum. The mortgage being transferred without any communication with those entitled to the equity of redemption, i.e., the trustees, the transferee took subject to such right of set-off, and, in the result, was bound to deliver the property up without any payment.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 21, pp. 177-179, para. 333, and FOR THE CASES, see DIGEST, Vol. 35, pp. 379-384, Nos. 1234-1271.]

Cases referred to :

- (1) *Turner v. Smith*, [1901] 1 Ch. 213 ; 35 Digest 549, 2779.
- (2) *Dixon v. Winch*, [1900] 1 Ch. 736 ; 35 Digest 383, 1269.
- (3) *Matthews v. Wallwyn* (1798), 4 Ves. 118 ; 35 Digest 263, 224.
- (4) *Williams v. Sorrell* (1799), 4 Ves. 389 ; 35 Digest 382, 1256.
- (5) *Norrish v. Marshall* (1821), 5 Madd. 475 ; 35 Digest 379, 1234.
- (6) *Re Southampton's (Lord) Estate, Allen v. Southampton (Lord), Banfather's Claim* (1880), 16 Ch. D. 178 ; 35 Digest 383, 1260.

ACTION by the trustees of the will of John Thomas Parker for : (i) a declaration against Harry Jackson and Gertrude Beatrice Davies, that a certain mortgage relating to property in Shrewsbury had been discharged in the circumstances hereinafter set out ; and (ii) an order against Gertrude Beatrice Davies for the delivery up of the mortgage deed and all prior documents of title relating to the property. Judgment

was given against the defendant Harry Jackson, in default of defence.

The facts are fully set out in the judgment.

C. E. Harman, K.C., and *A. T. Macmillan*, for the plaintiffs.

Harold Christie, K.C., and *H. O. Danckwerts*, for the defendant, Gertrude Beatrice Davies.

FARWELL, J. : This is an unfortunate action, in which one of two perfectly innocent parties has to suffer for the misdoings of a third party. It is a most unfortunate matter, whichever way I have to decide it, for the person against whom I decide, because the loss which will fall upon that person is due to the machinations of other persons and not to the fault of the person who suffers it. But I have to decide this question upon principles of law, and I must consider the matter from that point of view alone. The facts give rise to an interesting question of law which has been well argued by counsel on both sides. The plaintiffs are the present trustees of the will of John Thomas Parker, who died in 1921. By his will he appointed his widow (the first plaintiff) and a Mr. George William Ferrington to be executors and trustees thereof. Mr. Ferrington was a solicitor, carrying on business in Oswestry in partnership with a Mr. Jackson. That firm had acted as solicitors to the testator, and continued to act as solicitors for his executors. On Jan. 3, 1929, Mr. Ferrington died, and thereupon there was appointed in his place as a trustee of the will of the testator a man named Thomas Pryce Williams. Williams had been, and was at that time, the managing clerk of the firm of Ferrington & Jackson. He was not an admitted solicitor himself, he had not been admitted, but he was a managing clerk, and had, I gather, very largely the control over the affairs of the solicitors' business. On May, 28, 1934, Williams committed suicide. At or about that time it became known to everybody concerned that the firm was hopelessly insolvent and that it owed money to a very large extent; indeed, its affairs were in the utmost confusion, and it was found that some of those concerned were going to suffer, owing to the defalcations of those persons. Mr. Ferrington was then dead. Mr. Jackson, the other partner, was made a bankrupt upon his own petition, and his estate is being administered in bankruptcy. The estate of Mr. Ferrington, who was also bankrupt, is also being administered in bankruptcy. Mr. Parker in his lifetime had mortgaged four houses, which were his property, to which he was entitled in fee simple, namely, 9, 10, 11 and 12, Canon Street, Shrewsbury, for the sum of £700, to a Mrs. Martha Williams. Mrs. Williams, I think, died, and that mortgage was transferred and became vested in one David Davies. After the death of Mr. Parker, in March, 1926, the executors and trustees sold another property which had belonged to him and forms part of his estate, a house called "Branstone," for a sum of something over £2,000. The result of the sale, which was conducted, so far as the solicitors had

the conduct of it, by the firm of solicitors, Messrs. Ferrington & Jackson, was that a sum of £2,384 or thereabouts came into the hands of the solicitors. That money was subsequently invested in a mortgage to a Mr. Gitting; in 1928 that money was repaid, and there is no doubt that Ferrington & Jackson, the firm, had a sum of £2,000 or thereabouts in their hands, that being a sum representing part of the estate of the late Mr. Parker. That was the position at the death of Mr. Ferrington: that the partnership had in their hands a sum of over £2,000 which belonged to the trustees.

There was also still outstanding at that date the mortgage of the four houses in Canon Street, Shrewsbury. That mortgage was made by an indenture of Apr. 18, 1910, between the testator, John Thomas Parker, and Mrs. Martha Williams, and in consideration of £700 paid to the mortgagor by the mortgagee there was a covenant to repay with interest at 4 per cent. and a conveyance of the properties in question, subject to the equity of redemption. The mortgage is in the ordinary form, without anything unusual in it. That mortgage was subsequently transferred by a deed of Aug. 28, 1922, which recited the mortgage to Mrs. Williams and that she died on Dec. 1, 1917, and the death of Mr. Parker; and it also recited:

Whereas the principal sum of £700 secured by the before-written indenture is still owing to the mortgagee, but all interest thereon has been paid up to the date of these presents, and whereas the transferee at the request of the executors has agreed to pay to the mortgagee the sum of £700 upon having such transfer of the said principal sum of £700 and the securities for the same as hereinafter appearing.

Then the mortgage is transferred to Mr. Davies. On Nov. 29, 1929, Jackson, being the surviving principal of the firm of solicitors, took a transfer of that mortgage, but that transfer was made without the concurrence of the executors and trustees of Mr. Parker. It is effected by the document of Nov. 29, 1929, and it is made between David Richard Davies, called the transferor, and Harry Jackson, called the mortgagee, and it is expressed to be supplemental to the within written deeds to which I have referred. It recites that:

The principal sum of £700 still remains owing to the transferor upon the security of the within mortgage, but all interest thereon has been paid up to the date hereof.

Then follows this provision:

The mortgagee has agreed to pay to the transferor the sum of £700 upon having such transfer of the said principal sum of £700 and interest and the securities for the same as hereinafter appearing. Now in pursuance of the said agreement and in consideration of the sum of £700 now paid by the mortgagee to the transferor (the receipt of which sum the transferor hereby acknowledges), this deed witnesseth that the transferor as mortgagee hereby conveys and transfers to the mortgagee the benefit of the within written deeds in witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

The effect of that was that Mr. Jackson became the assignee of the mortgage for £700, but in accordance with the well-settled principle, as the mortgagors, the executors of Mr. Parker, were no parties to that deed and had, so far as I know, had no notice of it, he took, of course, subject to any accounts as between the mortgagors and the transferor. No question arises with regard to that, but it is important to take notice of it.

The position when Mr. Jackson took that transfer in his favour was this: Mr. Ferrington was dead and there was owing to the executors by the partnership firm at the death of Mr. Ferrington this sum of something over £2,000. There seems to have been no proper winding up of the partnership firm or any putting an end to that partnership firm in any legal sense at all. All that happened was that Jackson carried on the firm in the name of the firm as before, in that precise form, the only difference being that he started a new set of books as from the death of Ferrington; but there is no doubt, in my judgment, that Jackson became liable on the death of Ferrington, as the surviving partner of the persons carrying on the business, to make good to the trustees of Mr. Parker the sum that was then owing to them. That sum was something over £2,000. When Jackson became the assignee of the mortgage to Davies he was in this position: that whereas he was as mortgagee entitled to call upon the executors of Mr. Parker to redeem the property and pay him as mortgagee £700, together with interest and costs, the executors as mortgagors would have been entitled to claim that the amount owing in respect of that mortgage should be set off against the debt that was due to them by Jackson, and I have not any doubt that had Jackson started an action to foreclose, or had the executors started an action to redeem the mortgage, in either case there would have been directed an account or accounts to show what was the money owing to Jackson, if any, by the executors, which would have been the price of redemption. Now had the account been taken in Nov., 1929, or thereabouts, or soon after that date, undoubtedly there would have been shown on the taking of those accounts a sum in the hands of Jackson very much in excess of anything due under the mortgage, the result of which would have been, in my judgment, that Jackson would have been bound to hand over the title deeds and release the property from the mortgage without the payment of any sum to him, but, of course, thereby reducing the amount of his indebtedness to the executors by the sum required for redemption. Equally in my judgment, once the transfer from Davies to Jackson had been effected and Jackson became in the position of mortgagee, it was the right of the executors to direct Jackson to apply so much of the money as he had in his hands, or which he owed to the executors, in discharge of the mortgage. Had such direction been given to Jackson, in my judgment it is plain that the result would

have been that the mortgage would have been put an end to, because even although Jackson had not proceeded in terms to release his mortgage debt and hand over the title deeds, he would have been in this position : that he would have held the mortgage debt and the title deeds as trustee for the mortgagors, and he therefore could not have enforced, as against the mortgagors, any rights at all in respect of the mortgage. The executors, the trustees of Mr. Parker, undoubtedly had, in my view, a right to direct such appropriation of the debt owing to them or so much of it as was required for that purpose ; and had they taken that step, had they directed that appropriation to be made, in my judgment nothing that Jackson could do after that date could have given him or anyone claiming through him any rights whatsoever as against the mortgagors in respect of that mortgage. There is no evidence before me that any such direction was given. It is true that Mrs. Parker did say in the witness-box that she had on many occasions told Williams, as managing clerk of the solicitors Ferrington & Jackson, to discharge the mortgage, but there is no plea to that effect in the statement of claim, and although an opportunity was given to amend the statement of claim and plead that such notice had been given to Jackson, that opportunity was not taken, and I must deal with the case on the plea as it stands. I cannot take into consideration the statement made by Mrs. Parker in the witness-box, and I must treat this matter as though there was no direction to appropriate made by Mrs. Parker or anyone else prior to the transaction to which I am now about to refer.

Now it appears that the defendant Miss Davies was also a client of this firm of solicitors, Ferrington & Jackson. She had a sum of £700 which she desired to invest, and, most unfortunately from her point of view, she entrusted that £700 to her solicitors to invest for her. The money was lent in 1929 on a mortgage, but in Sept., 1932, that mortgage was paid off, with the result that the £700 which had been secured by that mortgage came back into the hands of the solicitors for Miss Davies. The money appears to have been placed on deposit in the name of the solicitors, I think, until Oct., 1932—I am not sure that it was not at a later date ; but at any rate, at some date after that, Jackson proceeded to create what I think was probably a sub-mortgage of this property of Mr. Parker in favour of Miss Davies. What took place was this : the title deeds of the property were handed to Miss Davies by the solicitors on May 20, 1933, and she was given a document, signed, I think, by Mr. Williams in the name of the firm :

We hereby certify that the sum of £700 principal due on the annexed security is the money of and belongs to Miss Gertrude Blanche Davies and we undertake to pay to her the interest thereon as and when received and if desired by her to obtain a transfer of the security to her.

There never was any transfer of the security to her, but, having received

that document and being in possession of the title deeds, which she still retains, she became, I have little doubt, an equitable mortgagee or sub-mortgagee of this property.

That transaction was one of which no notice whatever was given to the executors of Mr. Parker. It is to be noticed that at that date one of the executors was a Mr. Williams, who was the managing clerk of the solicitors. It has not been argued that, by reason of his being in the position of managing clerk to the solicitors, constructive notice was claimed to have been given to Mrs. Parker, and, of course, to Mr. Williams, of that transfer, and in fact Mrs. Parker, the present plaintiff, knew nothing whatever about the transfer until after the position of the firm had become known. The effect of that sub-mortgage or interest which Miss Davies claimed to have acquired in the property of the testator was brought to the plaintiffs' attention by a notice dated June 20, 1934. That was a notice sent to Mrs. Parker, the first plaintiff, by the firm of solicitors acting on behalf of Miss Davies. It is directed to Mrs. Parker as personal representative of Mr. Parker, deceased, and it is in these terms :

On behalf of Miss Gertrude Beatrice Davies of Avenham, Park Avenue, Oswestry, we hereby give you notice that the mortgage debt on Nos. 9, 10, 11 and 12, Canon Street, Shrewsbury, in the County of Salop, created by an indenture of mortgage dated Apr. 18, 1910, made between John Thomas Parker of the one part and Martha Williams of the other part now belongs to the said Gertrude Beatrice Davies and that all interest in future to become due in respect of the said mortgage should be paid to her or to us on her behalf.

Mrs. Parker, on receipt of that notice, wrote on the next day but one to the solicitors asking whether the interest due in April had been paid, and that was duly answered by a letter from the solicitors saying that the interest which became due in April had been paid. On Oct. 5, 1934, a claim on behalf of Miss Davies against Mrs. Parker was sent to her by Miss Davies' solicitors, claiming the amount of interest due on the mortgage, and Mrs. Parker, on receiving that notice, communicated with her solicitors. Her solicitors thereupon requested to see the deeds, and they were shown the deeds, and in due course, in Nov., 1934, acting no doubt under the advice of her solicitors, Mrs. Parker paid the amount due as interest, less income tax.

Under those circumstances Mrs. Parker no doubt and her co-trustee no doubt having taken advice in the matter, commenced this action. In effect it is an action to redeem, in one sense of the word. In fact what the plaintiffs are claiming is that they are entitled to recover from Miss Davies the title deeds free and discharged from any claim by Miss Davies in respect of the mortgage debt. Miss Davies takes the view that she had got an assignment of that mortgage debt to her. So far as she is concerned, there is no set-off or other claim which can be made

against her, and accordingly, if the plaintiffs desire to recover the title deeds and put an end to the debt, they must pay her that which is due on the mortgage. As I say, in one sense it is a redemption action, because the plaintiffs are really seeking to redeem the mortgage, but on the footing that there is nothing due in respect of the mortgage and that they are therefore entitled to have back their title deeds and to any other relief, if necessary, from their indebtedness. Those, I think, are all the facts which it is material to state for this purpose, beyond saying that the Law of Property Act, 1925, which came into operation on Jan. 1, 1926, had this effect: that, whereas the mortgage was originally a mortgage of the freehold and the legal estate in the freehold became vested in the mortgagee, subject only to a right of redemption, as a result of the coming into operation of that Act, the fee simple that was formerly vested in the mortgagee is converted into a term of 3,000 years. Except to that extent, it did not affect the position, and I cannot see that it can alter or affect in any way the conclusion to which I ought to come in this case.

In those circumstances, the plaintiffs are persons who have suffered by the fact that Jackson towards the end, and formerly Jackson and his partner, had in their hands, or had as a debt, a sum of something over £2,000, in respect of which, as I gather, the plaintiffs are not likely to recover any large amount in the bankruptcy, and if the defendant is right in her contention, the plaintiffs remain under an obligation to pay the £700 with interest and costs under the mortgage to which I have already referred. On the other hand, if the plaintiffs' contention be the true one, then the position of Miss Davies is indeed unfortunate, because, having this £700 in her hands being her own money, and having entrusted that money to her solicitors, having no reason whatever to doubt their solvency or honesty and trusting entirely in them, she finds herself in the unhappy position of having to hand over the only security she has got in respect of that money and of having no rights as against the plaintiffs, whatever rights she may have to prove in the bankruptcy or otherwise. Which of the innocent parties is to suffer is the question which I have to determine.

Now, as I have already pointed out, I think that there is no doubt whatever that if, prior to the creation of the sub-mortgage or the equitable title in Miss Davies, the executors of Mr. Parker had given notice to Mr. Jackson to appropriate sufficient of the money which he owed to them towards and in satisfaction of all moneys due under the mortgage at any time after Nov. 29, the effect of that notice must have been to prevent any claim thereafter being made in respect of the mortgage debt, either by Jackson or by any other person claiming through him. It is, I think, quite well settled that an assignee of a mortgage who chooses to take an assignment without the concurrence or consent of, or without

any notice to, the mortgagor, does so at his own peril, and he takes the security subject to the state of account between the transferring mortgagee and the mortgagor, because the rights of the transferee are subject to the same account between the mortgagor and the mortgagee at the date of the assignment. Therefore, as I have said, if direction or notice to appropriate had been given, there can be no doubt that Miss Davies would have no claim in this action at all. But it is said that in this case, there having been no direction to appropriate before the date of the creation of whatever equitable title Miss Davies may have, Miss Davies is now entitled to set up her rights as a mortgagee; although had Jackson attempted to set up any such right, even though no notice of appropriation had been given, he would have found himself faced with this: that he would have had to allow, against the amount due under the mortgage, the amount due, or so much of the amount due, from him to Miss Davies. It is said that to that extent Miss Davies is in a better position than Mr. Jackson, because the executors did not choose to take that step, and that the right of the third party—namely, Miss Davies—having arisen before any step was taken to appropriate the debt, or the amount due in that respect, Miss Davies is entitled to be put in a position in which Jackson could not have been, of standing on her mortgage and claiming repayment of the amount due.

Several authorities have been cited to me, one of which is said to be not unlike the present case: *Turner v. Smith* (1), decided by BYRNE, J. That case, however, has a very important distinction from the present case, because in that case the money was actually handed to the defaulting trustee for the purpose of paying off the mortgage, and when the mortgage got into the hands of the solicitor, as it did in due course, he was in fact bound to apply the money which he was given for that purpose in paying off the mortgage. Accordingly that mortgage ceased, at any rate in equity, to be an effective security as at the time it got into his hands, and he could not give any title to any assignee. That case, as I say, differs in a material respect from this one, because, although there were in the hands of the solicitors, prior to the date of the transfer to him, sums of money more than sufficient to discharge the debt, they had not been placed in his hands expressly for the purpose of discharging the debt, nor had notice or direction been given to the solicitors to apply the necessary amount of that money for that purpose. That case, therefore, is not, in my judgment, an authority in the present case, because the present case lacks the really important element which was present in that case. BYRNE, J., in the course of his judgment, says at page 219:

The effect in law of taking a transfer of a mortgage without the privity of the mortgagor has been so recently summed up by COZENS-HARDY, J., in the case of *Dixon v. Winch* (2), that I cannot do better than adopt his words, which are to be found at page 742 of the report: "It is well settled that where a mortgage is

transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: *Matthews v. Wallwyn* (3). And it is also well settled that payments of interest or payments on account of principal made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee *Williams v. Sorrell* (4). This doctrine has been extended to the case where the whole mortgage debt is, under similar circumstances, paid off: see *Norrish v. Marshall* (5), and *Re Lord Southampton's Estate* (6)." I need not refer to the expression of opinion which follows, because the learned judge recognises the law as stated, nor need I go further into the decision in that case either in the court of first instance or in the Court of Appeal, as it turned on very special facts which differ from those in the present case. Starting with the statement of the law as above, it appears to me that, assuming the transfer to Harrison to have operated as an assignment and conveyance to him in his personal capacity and not in the capacity of trustee for Smith, the result must follow that the mortgage debt immediately became discharged and that he held the property as trustee for the plaintiff, the principle being as stated by SIR JOHN LEACH, in *Norrish v. Marshall* (5): "That as against an assignee without notice" (meaning without notice to the mortgagor) "the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set-off, or mutual credit, as against the mortgagee, he can claim equally against the assignee."

In the case of *Norrish v. Marshall* (5), the case BYRNE, J., is there citing, it was said that in fact there had been some arrangement made whereby the amount due for the goods supplied by the mortgagor should be set off as against the mortgage, and it is said that that case, therefore, is also distinguishable from the present case. But the statement of SIR JOHN LEACH, V.-C., if it is to be taken in its strict meaning, is certainly wide enough to be fatal to the argument I have heard addressed to me in favour of the defendants, because he says :

The mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set-off, or mutual credit, as against the mortgagee, he can claim equally against the assignee.

Now the question here is : can the executors, having failed to give the necessary notice of appropriation, or direction to appropriate, to Jackson prior to the date when the interest of the third party—namely, Miss Davies—came into existence, now claim the right of set-off which they undoubtedly had as against Jackson, and would have had against Jackson had there been no transaction between Jackson and Miss Davies ? In my judgment, having regard to the authorities, I am bound to consider Miss Davies' position in exactly the same way as I should have to consider the claim of Jackson were the plaintiffs seeking to redeem as against him. If a person chooses to take an assignment of a mortgage without obtaining the concurrence of the mortgagor, he, or she, does so at his, or her, own peril. If a mortgagor joins in the assignment, he of course thereby recognises the existence of the debt, and it is impossible

for him to challenge the amount of the debt at the date of the transfer or thereafter. If a person does not choose to give notice to the mortgagor, or take the wiser step of getting the mortgagor joined in the transaction, then, in my judgment, the mortgagee cannot by the transferring deprive the mortgagor of any rights which he had as against the transferor. As I have already said, if the mortgagor is joined as a party to the transfer, or knows of it and does nothing in the matter, then I think it must follow that it is not open to the mortgagor thereafter to claim that he can set up some right which he might have had against the transferor of the original mortgage. But if the transaction as between the mortgagee and the assignee is done without the knowledge or the concurrence of the mortgagor, then, in my judgment, the mortgagor's position cannot be prejudiced by that transaction, and whatever rights the mortgagor has as against the mortgagee can be successfully asserted by him against the assignee.

Now in this case, as I have already said, I cannot doubt that, had the position been that the mortgage had remained vested in Jackson and an action to redeem the mortgage had been brought against Jackson, the mortgagor would have been entitled to say: "There is no money payable by me to the mortgagee, because the mortgagee has in his hands a sum greatly in excess of anything due under the mortgage." Once it is shown, as a result of taking the necessary accounts, that that was the position, then, notwithstanding that there had been no appropriation hitherto, in my judgment the plaintiffs would have been entitled in that action to redeem without the payment of any money at all, the only result being, of course, that the debt due from the mortgagee to the mortgagor would be proportionately reduced and the mortgagor would be entitled to have the benefit of the redemption without the payment of any actual money. That, I think, must necessarily follow. If that be the true position, then it seems to me that the assignee is no better off. If the assignee finds that her assignor has put himself into a position in which the property can be redeemed without the payment of any actual cash by the mortgagor, then the assignee is in no better position. But strictly—and it is that which is required in this case—the assignee is entitled to an account of the money due, principal, interest and costs, under the mortgage; she is entitled to an account of all moneys due from Jackson, her assignor, to the mortgagor. But if the result of taking that account be that the balance is largely or at all in favour of the mortgagor, then the assignee will find that under the order she will be bound to hand over and to have the property redeemed without the payment of any part of the money which she has unfortunately parted with in this way. As I said at the beginning of my judgment, it is a most unhappy case and one feels much sympathy with both parties, but I can only apply the legal principles as I think I must. In my judgment,

having carefully considered the authorities, I am unable to escape from the conclusion that the assignee, taking without the concurrence of the mortgagor and without notice, takes subject to any rights of set-off or otherwise which the mortgagor had against the assignor ; and, as in this case the mortgagors had an undoubted right of set-off against the assignor Jackson, under those circumstances the defendant Miss Davies is in no better position than Jackson would have been ; that is to say, the burden of the plaintiff cannot be increased by any step taken by the mortgagee without notice to the mortgagor. The mortgagors cannot be deprived, by an assignment made without notice to them, of any rights which they had as against the original mortgagee by an assignment by him to some third person. The person who takes an assignment of a mortgage without the concurrence of the mortgagor runs a very serious risk and may find himself, as this lady unfortunately finds herself, in the position of having parted with her money and getting nothing whatever for it.

Solicitors : *P. Griffiths-Averill*, agent for *Sprott, Stokes & Turnbull*, Shrewsbury (for the plaintiffs) ; *Patersons, Snow & Co.*, agents for *Lonqueville & Co.*, Oswestry (for the defendant, Miss Davies).

[*Reported by* CHARLES E. EDEN, ESQ., *Barrister-at-Law.*]

LYONS v. COLLINS (H.M. INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), May 11, 1936.]

Income Tax—Schedule A—Valuation—Valuation by person of skill—Rack rent—Income Tax Act, 1918 (c. 40), s. 138.

Assessments under the Income Tax Act, 1918, sched. A, were made on certain leasehold premises. The premises were valued in accordance with sect. 138 of the Act by "a person of skill" and the assessments reduced. The valuer's estimates of annual value were below the rent reserved under the lease which the commissioners held to be a rack rent :—

HELD : the commissioners were bound to accept the valuation put forward by "the person of skill", unless fraud or invalidity on the face of the valuation was shown.

[EDITORIAL NOTE. Under Income Tax Act, 1918, s. 138, provision is made for the valuation of property for the purposes of property tax—or income tax, sched. A—by "a person of skill," i.e., a professional valuer. If this is done such valuation overrides what is, in fact, the actual rent for which the property is let, though this may be thought to be a rack rent.

AS TO VALUATION BY PERSON OF SKILL, see HALSBURY, Hailsham Edn., Vol. 17, pp. 348, 349, para. 707. FOR THE INCOME TAX, 1918, s. 138, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 496.]

Cases referred to :—

- (1) *Stewart v. Lyons* (1934), 19 Tax Cas. 79 on appeal at p. 86 ; Digest Supp.
- (2) *Stokes v. Sulley* (1899), 4 Tax Cas. 98 ; 28 Digest Case (m).
- (3) *Williams v. Sanders*, [1927] 2 K.B. 498, 11 Tax Cas. 673 ; Digest Supp.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the Division of Leeds Borough in the County of York, for the opinion of the King's Bench Division of the High Court of Justice.

A. M. Latter, K.C., and *Cyril King* for the appellant.

The Solicitor-General (Sir T. J. O'Connor, K.C.), and *Reginald P. Hills* for the respondent.

LAWRENCE, J. : This case turns upon the interpretation of the Income Tax Act, 1918, s. 138 (1), which provides :

If on appeal against an assessment under sched. A or sched. B any dispute arises as to the annual value of any lands, tenements, hereditaments, or heritages, the general commissioners may, if they consider it necessary, and shall, if required by the appellant, direct the appellant to cause a valuation to be made by a person of skill named by them, and may require the same to be verified on the oath of such person, and the annual value shall be determined in accordance with that valuation.

It is not necessary for me to read the other two sub-sections, though I shall comment on them hereafter. The history of this case seems to me to be highly unfortunate. What happened was that a dispute did arise as to the annual value of the lands in question which were leased by

the appellant to a company called Swears and Wells who had sublet a part of the premises to a company called Etam Limited. The dispute was as to the annual value of these premises for the years 1927/28 to 1931/32. The appellant required that a valuation should be made by a person of skill under sect. 138. Accordingly the commissioners, in pursuance of that section, appointed a valuer to arrive at a valuation. That valuer put a value upon the premises of £1,200 for the first year, £1,400 for the next three years, and £1,330 for the last year. He then appeared before the commissioners and was apparently asked a series of questions on behalf of the revenue authorities and gave certain answers to the effect that his valuation was made without knowledge of the exact rents payable by the occupiers of the premises, and was made on the basis that sect. 138 set aside the provisions of the Income Tax Acts relating to the annual value under sched. A, and provided for a completely independent valuation. Those answers having been given by the valuer, the general commissioners determined the value in accordance with his valuation and appear to have assumed that those words meant that they were bound by his valuation. An appeal was taken by the Inland Revenue before this court (1) and was decided by FINLAY, J., in favour of the taxpayer holding that the true interpretation of sect. 138 is that the general commissioners must determine the value in accordance with the valuation of the person whom they have directed to value. An appeal was then taken to the Court of Appeal (1) and the Court of Appeal decided that owing to the answers of the valuer there had been no valuation under sect. 138. LORD HANWORTH, M.R., however, in his judgment, expressed the view that sect. 138 did not bind the commissioners to adopt the valuation of the valuer whom they had directed to value. LORD HANWORTH, M.R., based his view upon the words "shall be determined in accordance with that valuation" by saying that those words did not say that the annual value should be determined by the valuation of the valuer, but only in accordance with the valuation of the valuer, and that that left it open to the commissioners to decide upon a value different from the valuation put by the valuer. He found support for the view which he took from subsect. (3) which he said indicated that the final determination was to lie with the commissioners and contemplated that the final determination might be something different from the valuation made by the valuer. He expressly disagreed with the view which FINLAY, J., had taken of sect. 138, and with the view which had been expressed by LORD McLAREN in a Scottish case to which my attention was called, the case of *Stocks v. Sulley* (2). SLESSER, L.J., did not take the same view as LORD HANWORTH, M.R., nor did ROMER, L.J. SLESSER, L.J., said at page 90 :

In my view we are not concerned here to consider the case of what would have happened if that statement [a statement made by the valuer] had not been made.

The question which is propounded to us, whether the commissioners were bound to accept the valuation, states that he had so disregarded the rules, and it is upon that basis that the learned judge considered this case and I consider it.

ROMER, L.J., expressed himself in the same way, and also said that he thought, though he did not actually decide, that the commissioners had no jurisdiction to depart from the valuation of the valuer. It appears to me, therefore, that I am not bound, and it was not contended by the Solicitor-General on behalf of the Crown that I was bound to follow the *dicta* of LORD HANWORTH, M.R., in preference to the *dicta* of LORD McLAREN, FINLAY, J., and ROMER, L.J. In those circumstances, the Court of Appeal, having set aside the decision of the general commissioners on the ground that there was no valuation made under sect. 138, the appellant again required the commissioners to direct him to cause a valuation to be made by a person of skill to be named by them and they named another person of skill, Mr. Arthur Mosley, to make a valuation. Subsequently they met to consider the report of Mr. Mosley. Mr. Mosley's report was apparently made in writing and stated that he had made a careful inspection of the property and stated the material facts, including the facts as to the lease under which the premises were held, the rent to be paid for the premises, the fact that part of the premises were separately occupied by Etam Limited, and concluded with these words :

My estimate of the annual value of the property in accordance with the Income Tax Act, 1918, sched. A, is as follows : The first year £1,290, and for the other four years £1,360.

At this meeting before the general commissioners at which this report of Mr. Mosley was put forward, the appellant, or his representatives, took the point that it was not competent to the commissioners to order the examination of Mr. Mosley, and the Crown contended to the contrary that Mr. Mosley should be examined as to the principles adopted in arriving at his valuation. The commissioners did not apparently give any express decision upon those two contentions and as a fact no questions were put to Mr. Mosley by the commissioners or by the parties, nor did the commissioners require, as they might have required, his report to be verified on oath. The commissioners proceeded, after careful consideration, into which they took into account, according to the case, the estimates put in by the person of skill, Mr. Mosley, the rent reserved under the lease, and all the surrounding circumstances, and their local knowledge :

and being of opinion that the rent reserved under the lease was a rack rent, and that the rules of sched. A required the annual value to be based on the rack rent, reduced the original assessment, which had been a figure of £2,750 to £2,000 for each of the years. They then said that the question for the

court was whether they were bound to accept the valuation put forward by the person of skill in view of the fact that his estimates of annual value were below the rent reserved under the lease which they held to be a rack rent. The Solicitor-General has argued that there is in the first place an error on the face of the report of the valuer, Mr. Mosley, in that he has attached a different value to the premises for the year 1927/28 to that which he has attached to the premises for 1928/29 and the succeeding years, and he submits that that is not in accordance with the Finance Act, 1928, s. 15 (4). In my opinion there is no substance in that argument in point of fact in view of the facts which are stated in para. 2 (d) and (e) of the original case, which shows that the reason why the lower value was attached to that year both in the valuation of the former value, and of Mr. Mosley, was that the premises were altered during the currency of the year 1927/28, and that it was not in dispute that the alterations made such a change in the property that it was a different property from that which existed previously. It became a more valuable property in the middle of the year and, therefore, a different valuation was put upon it. It was also agreed that it was a different property from that which existed previously, and, secondly, that it was necessary to ascertain the annual value of the property without consideration of the annual value previously arrived at on the property before the alteration. I therefore dismiss this point from consideration. The Solicitor-General went on to argue that sect. 138 has not the effect of binding the commissioners to adopt the valuation put by the valuer and that I ought to adopt the reasoning of LORD HANWORTH, M.R., in the case in the Court of Appeal. He contended that the true interpretation of the section was that the valuer who was so appointed by the commissioners ought to be treated not as an inferior court, nor as a court who finally determines the annual value, but merely as a witness. He relied upon the fact that by subsect. (3) the commissioners have to arrive at a final determination, and he submitted that that indicated that it was a determination on a review of the valuer's valuation. He contended that if the commissioners from whom this appeal is brought had taken the wrong course in putting the valuation which they did upon the premises that the matter ought to be sent back to them for them to determine, or that I ought to determine that there was no valuation by Mr. Mosley, and that the matter ought then to be sent back to the commissioners for them to direct, if they thought right, that a valuation should be made by a person of skill, or that the appellant should have the option to have a third valuation made by a person of skill. I may summarise the Solicitor-General's argument, I think, by saying that he contended in the first place that the report of the valuer was bad on its face because of the increase of the figure for the year 1928/29; in the second place he said that it obviously dis-

regarded the rent reserved by the lease ; in the third place he said that the report of the valuer disregarded the subdivision of the premises ; fourthly he said that it was not clear whether the valuer had aggregated the rent of the two tenements, and he referred to *Williams v. Sanders* (3). Finally he contended that the Crown ought not to have been precluded from putting questions to the valuer. I have already dealt with the first of these points that the report of the valuer was bad on its face. As to the second point, I am of opinion that there is nothing to show that the valuer did disregard the rent reserved by the lease, nor that he disregarded the subdivision of the premises ; in fact he referred to the separate occupations. As to the case of *Williams v. Sanders* (3), as a fact there were not two tenements in this case because the matter that was being considered was one lease by the appellant to Messrs. Swears & Wells. As to the suggestion that the Crown were precluded from asking any questions of the valuer, I am of opinion that the case does not establish that that was the fact. Upon the general question, which may be a question of some importance, in my opinion the view expressed by FINLAY, J., LORD McLAREN, and ROMER, L.J., is to be preferred to the view which was taken by LORD HANWORTH, M.R. It appears to me that the section was obviously designed for the purpose of ascertaining the annual value once and for all finally, and that it was not intended that a person of skill should be appointed to determine the annual value and should then be subject to cross-examination and review by the commissioners. In my view the words of the section are totally inapplicable to any such view of the content of the section. The words "may require the same to be verified on the oath of such person" seem to me to be designed to indicate that the commissioners are to be satisfied that the report which is produced is the report of the person whom they direct to value. Verification does not mean a person is to be liable to examination and cross-examination as to every detail of his valuation ; it simply means that he is to verify the valuation as being his valuation. The words "the annual value shall be determined in accordance with that valuation" indicate in my view that the function of the commissioners, is finally and formally to adopt the valuation of the person appointed apart from any question of dishonesty or fraud, or apart from any invalidity on the face of the valuation. I cannot think that the words suggested by LORD HANWORTH, M.R., would have been appropriate. The wording which he suggested was that the section might have said : "the annual value shall be determined by that valuation." It seems to me that the words "shall be determined in accordance with that valuation" are much more suitable to describe the function, which, in my view, is to adopt the valuation, if it is an honest valuation and correct upon its face. The words of subsect. (3) do not seem to me to support in any way the contrary view. There was to be a final

determination of the commissioners, because they are the persons who have finally to determine the assessment. The words "if the value so found exceeds the value alleged by the appellant" are totally inapplicable in my view to define the functions of a witness. "The value so found by the valuer" are not words which are appropriate to describe the functions of the witness, and there is no word, in my view, throughout the section which indicates that the commissioners are to sit as a court of appeal upon the finding of the valuer as to the annual value.

Now it was suggested in the course of the argument that in some way the commissioners could be supported having regard to sched A., r. 1, which provides :

. . . The annual value shall be understood to be : (1) the amount of the rent by the year at which they are let, if they are let at rack rent.

It was said the commissioners were entitled here to adopt the view that the rent reserved by this lease was the rack rent ; but in my judgment the question whether the rent reserved by the lease was the rack rent or not was a question as to which a dispute might arise, and did arise, and was a dispute as to the annual value within the meaning of sect. 138. It was, therefore, not open to the commissioners, if I am right in my reading of sect. 138, to review the valuation put by the valuer in resolving this dispute upon the basis that the rack rent which constitutes the annual value was something different from the figure which the valuer put upon it.

For those reasons I am of opinion that the appeal must be allowed with costs.

Question for the decision of the court : whether the commissioners were bound to accept the valuation put forward by the person of skill. Answered in the affirmative.

Solicitors : *Gisborne & Co.* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

Re SKEATS, THAIN *v.* GIBBS.

[CHANCERY DIVISION (Clauson, J.), May 6, 1936.]

Will—Construction—Appointment of executor—No disposition of beneficial interest in estate—Executors Act, 1830 (c. 40)—Administration of Estates Act, 1925 (c. 23), ss. 46, 49.

A testator by his will appointed his wife sole executrix and directed that all his just debts and funeral and testamentary expenses should be paid. He made no disposition of any part of the beneficial interest in any of his property. Upon a summons to determine the destination of the residuary estate, it was contended on behalf of the wife, that the effect in the present case of the Administration of Estates Act, 1925, and of the repeal of the Executors Act, 1830, was to restore the law as it was before 1830, and that the wife, as executrix, took the whole of the testator's personal estate :—

HELD : except to alter the class constituting the next-of-kin, the law as it stood since 1830 had not been altered and the wife as executrix held the estate upon trust to distribute it in accordance with the Administration of Estates Act, 1925, s. 46.

[EDITORIAL NOTE.] This case clears up a doubt which is noted in HALSBURY, Hailsham Edn., Vol. 10, p. 588, note (s). The difficulty arises from the repeal of the Executors Act, 1830, without the enactment of any corresponding provision, and seemed to suggest that where a will merely appointed executors, the executors would take beneficially, as they would have done before 1830. His Lordship has avoided this result by consideration of the definition of "intestate" in the Administration of Estates Act, 1925.

FOR THE POSITION HERE ARISING, see HALSBURY, Hailsham Edn., Vol. 10, pp. 606-610, paras. 886-889 ; and FOR CASES, see DIGEST, Vol. 23, pp. 468-473, Nos. 5377-5424.]

ADJOURNED SUMMONS for the determination of questions arising on the construction of the will of Robert Skeats, who died on Mar. 20, 1929.

The testator's will, which was dated July 17, 1912, was as follows :—

This is the last will and testament of me, Robert Skeats, of 17, Thornbury Road, Spring Grove, Isleworth, Middlesex, made this 17th day of July, 1912.

I hereby revoke all wills by me at any time heretofore made. I appoint my wife, Mary Skeats, to be my sole executor, and direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease.

I give and bequeath unto

In witness whereof I have hereunto set my hand this 17th day of July, 1912.

The question asked by the summons was whether by virtue of her appointment as sole executrix or otherwise, Mary Skeats, widow of the above-named Robert Skeats, became beneficially entitled under the above-named will to the whole of his residuary estate subject to the payment of his debts and funeral and testamentary expenses or whether such residuary estate ought (subject to provision thereout being made for the said Mary Skeats in accordance with the Administration of Estates Act, 1925, s. 46 (1) (i)) to be held upon trust for the next of kin

of the said Robert Skeats in accordance with the provisions of the said section.

M. O'Connell Stranders, for the plaintiff, the personal representative by representation, of the will of the testator, stated the facts.

F. E. Skone James, for the first defendant the residuary legatee and executrix of Mary Skeats, who died on May 5, 1935 : Since 1925, when there is an appointment of an executor and nothing more, the *prima facie* presumption is the same now as it was before 1830 and the executor takes beneficially. Before the Executors Act, 1830, the executor of a testator who died without making an express disposition of residue, at law was entitled to the residue so far as it consisted of personalty, and Courts of Equity so far followed the law as to allow the executor to retain the residue beneficially, unless it appeared from the will to be the testator's intention to exclude him from the beneficial interest. The Act of 1830 altered that rule by providing that the executor should hold the undisposed of residue as trustee for the persons entitled under the Statutes of Distribution, unless there was something in the will to imply that he should take it beneficially. The Administration Estates Act, 1925, repealed the Act of 1830, but the only section by which it did so is sect. 49, and that section is directed solely to the case of a partial intestacy. It does not deal with a complete intestacy, and, that being so, a Court of Equity ought now, in dealing with a case of complete intestacy as to the beneficial interest, to deal with the matter in accordance with the law as it was before 1830.

CLAUSON, J. : Is it quite clear that he has not effectively disposed of part of his property ? He has effectively disposed of such part of his property as is required to pay his just debts.

Skone James : He cannot be said to have beneficially disposed of his estate when he directs something to be done which will have to be done in any event.

W. F. Waite for the other defendants, the next-of-kin of the testator : Before 1830 the executor got the beneficial interest in the undisposed of residue not *because* the testator died testate and was supposed to have given it to him, but *notwithstanding* that the testator died testate. The executor took the estate by force of law because the Ecclesiastical Courts and the Courts of Chancery had no means of getting it from him. But now the Administration of Estates Act, 1925, has to be considered, and it is quite clear that the testator is intestate to this extent, that he has not disposed of the whole beneficial interest in his estate. That brings him within the definition of "intestate" in sect. 55 (1) (vi) of the Act, and sect. 46 says that the estate of an intestate must be dealt with in a certain way.

CLAUSON, J. : In this summons I have to determine a point which, although it may not very frequently arise, is an important point and

of very considerable interest. The testator, Robert Skeats, made his will on July 17, 1912. He thereby revoked all wills by him made at any time theretofore. He appointed his wife Mary Skeats to be his sole executrix and directed that all his just debts and funeral and testamentary expenses should be paid as soon as conveniently might be after his decease. Then appear in his will the words "I give and bequeath unto" which are followed by a gap, and he never filled up that gap, but executed his will and it was admitted to probate. By the will accordingly he appoints an executor, but does not, unless the appointment of the executrix operates to dispose of the beneficial interest in his property, make an effective disposition of such beneficial interest.

Assuming the testator had died before the year 1830 the operation of the will would have been this. He appointed as executrix his wife. That vested his property in her at law. Under certain circumstances a Court of Equity would treat the executrix as a trustee for the next-of-kin. But on this will, I am satisfied, as the law then stood, the executrix would have taken the property, and would have retained it beneficially, and no court would have interfered with her doing so. But in the year 1830 the law was changed and the Executors Act, 1830, was passed, which recited :

Whereas testators by their wills frequently appoint executors without making any express disposition of the residue of their personal estate : and whereas executors so appointed become by law entitled to the whole residue of such personal estate ; and courts of equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate : where it is desirable that the law should be extended in that respect :

the Act then goes on :

Be it therefore enacted, that when any person shall die after the first day of September next after the passing of this Act, having by his or her will, or any codicil or codicils thereto appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially.

There was a proviso which in substance protected certain current rights, but with that I am not concerned.

I am clear that if the testator in this case had died before the coming into effect on Jan. 1, 1926, of the Administration of Estates Act, 1925, the Executors Act, 1830, would have applied, and that the effect of this will would have been to appoint the widow executrix, but that she would

be a trustee for the persons who would take under the Statutes of Distribution, which in the circumstances of the case would be herself and certain other persons. However, the testator died after that date. He died on Mar. 20, 1929, at a time when the Administration of Estates Act, 1925, was in operation, and there is no doubt about this, that the effect of the Administration of Estates Act has been to alter the law as to the classes of persons who, in the case of an intestacy, or a partial intestacy, take as next-of-kin. As to that there can be no question. It is suggested, however, that the effect of the Act of 1925 has been also to alter the law as it stood immediately before 1926, and in effect to restore the law as it applied to testators who died before Sept. 1, 1830, and it is argued that the effect of the Act is this, that now I am bound to hold that the appointment of the widow as executrix gave her the whole of the testator's personal estate. I may parenthetically remark that, in the circumstances of this case, I should be by no means disturbed if I were able to find that to be the result, as I cannot feel any doubt that if the testator had had proper advice, or if his will had been drawn by anybody skilled in the matter, he would certainly have given his wife his property. But, unless I can hold that the effect of the Act of 1925 has been to restore the law to the position in which it was before 1830, I cannot hold that this will operated to give to the wife this personal estate.

The way the case is put for the widow is this. My attention is drawn to the fact that under sect. 46 the residuary estate of the intestate is to be divided in a certain way. My attention is also drawn to sect. 49, which contains provisions which apply when a person dies, leaving a will effectively disposing of part of his property, which of course it does not do in this case, in that the testator has left a will not effectively disposing of any part of the beneficial interest in his property. And finally my attention is drawn to the fact that the Executors Act of 1830 is repealed, and I am asked to hold that the net result of all this is that the operation of this will is no longer affected by the Executors Act, 1830, but operates under the law as it stood before 1830, so that the executrix, there being no disposition in favour of any other person, takes the estate, the testator not having died intestate. In other words the position is this. It is suggested that sect. 46 deals with the residuary estate of an intestate. But this man is not intestate because he made a will and so sect. 46 does not apply. On the other hand it is said that sect. 49 does not apply, because he did not effectively dispose of any part of his property. So the Act of 1925 does not touch this will, and neither does the Executors Act, 1830, touch it, and so I must deal with it as if the testator had died before 1830.

If that argument is a sound one it seems to indicate this, that through what one supposes must be some error of the draftsman, the law has been

put back very nearly a century, if I may so express it. If the Act of 1925 has so provided, that is the conclusion one must reach. But, after considering the matter, I do not think that that has been done, and I think I am bound to hold, although as I have already said, in this particular case with some reluctance, that the effect of this will, by appointing the wife executrix, is to leave her under the obligation of distributing the property among the persons indicated as the persons to take under sect. 46. Practically it means £1,000 to the widow, a life interest to the widow and the balance to be distributed amongst the relations of the testator.

This matter, however, requires more serious attention because of the very awkward fact that in the Administration of Estates Act the definition of "intestate" covers not only the obvious case of a man who makes no will. The Act by its definition clause adds this to the meaning of the word "intestate": "'Intestate' includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate." Now intestate cannot in the latter part of that sentence possibly have the meaning "without a will" which is its literal meaning, because the phrase is used in reference to a person who dies leaving a will. It must have some other meaning, and the meaning which it has in my view is this: a person of whom it can be said that he has not made an effective disposition of the beneficial interest in the whole of his property. If that be the right view, then when a man has made only a partial disposition of the beneficial interest in his property, or has made no disposition of the beneficial interest in his property, although he has made a will, the Act works out in this way, namely, that all his property must be divided in the way indicated in sect. 46, with the modification indicated in sect. 49 of the Act, in the case where there has been a partial, but not a complete disposition. The result of that seems this, that the law remains exactly the same as it was before this Act was enacted, with the modification that the classes of next-of-kin who take have been altered.

A very ingenious point has been put for me to meet, a point which, I think, is unsound. It is said that the appointment of an executor of itself is an effective disposition of the beneficial interest. It was so before 1830, and, having regard to the fact that the Act of 1830 is repealed, it is said that I must treat it as being so now. The answer to my mind is this, that it is not true that by the appointment of an executor, as the law stood before 1830, a testator made an effective disposition of the beneficial interest in the whole of his property. He made no disposition at all of the beneficial interest in his property by appointing an executor. The executor having been appointed, by virtue of his office took the property. He took it not by reason of any beneficial disposition by the testator, but by means of his office.

The net result is that I hold that the enactment of the Administration of Estates Act has not altered the law with regard to the material matter which has been argued. But I may say this, that I shrewdly suspect that what I am bound to hold will disappoint the wishes of the testator, namely, that the effect of his will is not to vest the personal property in his wife, but to make her executrix with the obligation of distributing the estate in accordance with sect. 46 of the Administration of Estates Act amongst those who are popularly, but not quite accurately, spoken of as the next-of-kin.

Solicitors : *Langford, Borrowdale & Thain* (for the plaintiff and the last defendants other than the first defendant); *Samuel Price & Sons* (for the first defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

APPENRODT v. CENTRAL MIDDLESEX ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **May 20, 1936.**]

Rates—Licensed premises—Monopoly value—Rent the hypothetical tenant would pay—Licensing (Consolidation) Act, 1910 (c. 24) s. 14.

In April, 1932, a new justices' on-licence was granted for five and a quarter years upon condition that the licensee should pay a monopoly value of £3,000 by instalments of £600. He contended that these payments were one of his normal working expenses and should be taken into consideration in deciding the rent the hypothetical tenant would pay for the premises:—

HELD: the true nature of the monopoly value payment was a special charge on capital value and it was not a payment necessary to maintain the hereditament in a state to command the rent and ought not to be taken into consideration in making an assessment for the rating purposes.

[EDITORIAL NOTE. This is the first occasion the question of the relevance of a consideration of the payment of monopoly value under Licensing Act, 1910, s. 14 when making an assessment for rates has arisen. The court was clear that it was not a payment necessary to maintain the hereditament in a state to command the rent and that it ought to be shut out from consideration. This would seem to be the general view since the matter has not been litigated before.

AS TO RATING OF LICENSED PREMISES, see HALSBURY, 1st Edn., Vol. 24, Rates, pp. 41, 42, para. 73, and FOR CASES, see DIGEST, Vol. 38, pp. 564–567, Nos. 1024–1055.]

Cases referred to:

- (1) *R. v. Customs and Excise Comrs.*, [1913] 3 K.B. 483; [1914] 2 K.B. 390; 30 Digest 20, 128.
- (2) *R. v. Taylor, R. v. Amendt*, [1915] 2 K.B. 593; 30 Digest 35, 272.

APPEAL by the Central Middlesex Assessment Committee by way of case stated by the Middlesex Quarter Sessions.

The respondent appealed to the Middlesex Quarter Sessions against a decision of the appellants upon his proposal to amend the entry in the valuation list for the Borough of Hendon in respect of the Brent Bridge Hotel by entering the gross value at £2,560 and rateable value at £2,130. The respondent is owner and occupier, and there are no comparable premises in the neighbourhood.

In 1932 a new on-licence was granted by the justices for five and a quarter years and, pursuant to the Licensing (Consolidation) Act, 1910, s. 14 (2), attached a condition thereto that he should pay as monopoly value the sum of £3,000 by five annual payments of £600. It was contended for the respondent that the annual payment of £600 in respect of monopoly value was a transfer to the public of the additional value added to the hereditament by the licence, and would therefore be a first charge to be considered in any negotiation as to the rent. It should, therefore, be treated as one of the normal working expenses of the tenant.

The appellants contended that as between a hypothetical landlord and tenant the premises must be deemed to be licensed, and any payment for monopoly value, or otherwise to obtain such licence, must be deemed already to have been made, or alternatively, that the said payment ought not to be included as a working expense in that it was a capital sum or instalments of a capital sum and, whether payable by the landlord or the tenant, ought not to be taken into account in estimating the rental value of the hereditament. The parties agreed that the effect of including the said £600 as a working expense of a tenant would be to reduce the gross value otherwise arrived at by £418.

The court of quarter sessions was of the opinion that the assessment appealed against was excessive, even if the said payment ought not to be taken into account, and that the true gross value on that basis would be £2,278. But it was of the opinion that the said payment ought to be taken into account and that the said gross value ought to be reduced accordingly to £1,860, on the grounds that although the said payment was a capital sum, in this case it has to be paid by a tenant in annual instalments and therefore was an expense necessary to maintain the hereditament in a state to command the rent. The respondent's appeal was allowed, and the gross reduced value to £1,860 and the rateable value to £1,547. Upon being requested to state a case, the following case was stated for the decision of the Divisional Court: whether the court of quarter sessions was right in holding that the said annual payments in respect of monopoly value should be taken into account as diminishing the rent a hypothetical tenant would otherwise pay for the hereditament.

F. J. Tucker, K.C., and Michael Rowe, for the appellants.

Maurice Healy, K.C., and Harold Williams, for the respondent.

F. J. Tucker, K.C.: Any payment not mentioned in the Rating and Valuation Act, 1925, s. 6, must be assumed to be paid by the landlord and not the tenant. This was an initial charge split up into annual payments for the sake of convenience, and was not necessary to maintain the hereditament in a state to command the rent.

Maurice Healy, K.C.: It is a payment *sui generis* to secure to a third party the benefit of a contract entered into by two other persons. The person operating the premises, that is, the tenant, must ultimately pay the monopoly value. Such payment must be treated as an ordinary working expense that a tenant must pay.

LORD HEWART, L.C.J.: This is a special case stated under the Rating and Valuation Act, 1925, s. 31. The question involved is by no means free from difficulty, and in spite of the ingenious and attractive arguments of Mr. Healy, it is clear that the appeal must be allowed.

The point can be quite shortly stated. The Central Middlesex Assessment Committee, the appellants in this court, appeal against a decision

of the court of quarter sessions. The appellant in the court below is the owner and occupier of the Brent Bridge Hotel, Hendon, and he applied in April, 1932, for a new justices' on-licence in respect of those premises. The licence was granted for five and a quarter years, and it was a condition that the appellant should pay as monopoly value the sum of £3,000 by instalments of £600. In the appeal he made to quarter sessions he contended that the payment of that sum of £600 in respect of monopoly value was a transfer to the public of the additional value added to the hereditament by the licence, and should therefore be treated as one of the normal working expenses of the tenant.

The question, and the only question, raised by this appeal is whether the court below was right in holding that the annual payment of £600 in respect of monopoly value should be taken into account as diminishing the rent a hypothetical tenant would otherwise pay for the hereditament.

It seems a little odd at first blush that though twenty-six years have gone by since the passing of the Licensing (Consolidation) Act, 1910, there is no express authority on the particular point raised in this appeal. I cannot help thinking that one reason for this state of affairs is that it has been generally recognised that the kind of claim put forward in the court below by the owner-occupier was a claim that cannot be maintained.

The provisions as to monopoly value are contained in sect. 14 of the Act of 1910. The vagueness of the terms employed in that section are interesting. The section provides :

The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public ; subject as follows :—(a) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed.

“ Best adapted for securing to the public any monopoly value.” But securing from whom ? From what quarter ? From what source ? The section does not say. There follows a provision as to the payment by instalments.

Now here an order was made and a condition attached requiring the payment of £3,000 by five instalments of £600. In my opinion that was an accident—a mere coincidence—a matter of convenience. The total sum was distributed over five years, but only in that sense any element of annual payments comes into the matter. I say that because it seems that the justices were unduly influenced by the fact of these annual payments.

What is the true incidence of these payments ? The authorities cited by Mr. Tucker leave no doubt in my mind that this was a capital payment. In the considered judgment of LUSH, J., in *R. v. Commissioners of Customs and Excise* (1) he says, at p. 497 :

I cannot read that section without coming to the conclusion that the sum to be ascertained is the capital sum which represents the monopoly value. I should have thought that, when one speaks of the value which premises either do now bear or will bear when licensed, one refers to the sum which they would realise if converted into money, the market value, the sum which they are worth. One does not naturally think of that in terms of rent, but in the terms of purchase-money."

Again, in *R. v. Taylor* (2), LORD READING, L.C.J., says at p. 601 :

The monopoly value must be a definite capital sum ascertained by the justices once and for all, and the conditions of payment to secure it must be fixed once for all when the licence is applied for, and before it is granted, and subject only to the power of reduction given to the Commissioners of Customs and Excise under the Finance (1909-10) Act, 1910, s. 47.

That being the true nature of monopoly value, it appears to me to be quite immaterial that for the purposes of this case the whole sum was to be paid by a series of instalments. What is it the justices have found ? They have expressed their views with brevity, but I cannot help thinking there is something in the nature of a misprint. On page 6 of the case :

" . . . we were further of the opinion that the said payment ought to be taken into account, and that the said gross value ought to be reduced accordingly to £1,860 on the grounds that although the said payment was a capital sum, in this case it has to be paid by the tenant in annual instalments and therefore was in our opinion an expense necessary to maintain the hereditament in a state to command the rent.

When I look at the word " therefore," what does it convey ? The justices seem to say that because this sum was to be paid by instalments, it follows that it was an expense necessary to maintain the hereditament in a state to command the rent. That seems to be an echo of the last words of the definition of " gross value " contained in the Rating and Valuation Act, 1925, s. 68 :

Gross value means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

Here on page 6 of this case are the words " in a fit state." If that were a true description, it was a description of the kind of expense that the landlord undertakes to bear, and not the tenant, and contradicts the conclusion for which it is offered. If it were true that this payment of monopoly value, whether by instalments or not, was a payment of ex-

pense necessary to maintain the hereditament in a state to command the rent, that would be an answer to the claim of the appellant in the court below. In my opinion Mr. Tucker is quite right in not basing his argument on that foundation. This payment is not of the kind covered by the words "necessary to maintain the hereditament in a state to command the rent."

What is the nature of this payment ? Does it come within the payments mentioned in sect. 68 of the Act ? In my opinion it does not. Nor does it come within the category of "usual tenant's rates and taxes." It is in a class by itself. It is not a tenant's charge and it is not a landlord's charge. It is a special charge on capital value. It is impossible that it should be taken into account in ascertaining what a tenant from year to year would pay by way of rent.

I think, therefore, that the court below came to an erroneous conclusion in point of law. The appeal will be allowed and the order of the court below varied.

HUMPHREYS and DU PARCQ, JJ., concurred.

Solicitors : *Blundell, Baker & Co.* (for the appellant) ; *Rye & Eyre* (for the respondent).

[*Reported by* H. P. LANSDALE-RUTHVEN, ESQ., *Barrister-at-Law.*]

LIVERPOOL CORN TRADE ASSOCIATION, LIMITED. v. HURST AND OTHERS.

[KING'S BENCH DIVISION (MacKinnon, J.), **May 8, 11, 1936.**]

Companies—Association for promoting interests of the corn trade—Meaning of “members of the association”—Guarantee—Joint guarantee—Release of one joint guarantor—Right of association to sue.

The Liverpool Corn Trade Association, Limited, is an organisation for promoting and protecting the interests of those engaged in the corn trade. Membership is confined to individuals, but companies, either public or private, engaged in the trade can have the advantages of membership by nominating, in the case of a private company, one representative, on condition that a guarantee by the directors is given to the association that the company will duly discharge its liabilities to members, and for the conduct of its representative. The defendant in 1931 had joined with Mr. E. A. Strauss and two other directors of Strauss and Co., Limited, a private company, in a joint and several guarantee to the association, given in accordance with this provision. This action was brought by the plaintiffs claiming a declaration that they were entitled as trustees for ten firms and companies who were creditors of Strauss & Co., Limited, to enforce the guarantee in question. Strauss & Co., Limited got into financial difficulties and in 1935 Mr. E. A. Strauss executed a deed of assignment for the benefit of his creditors under which he was released from all “debts, claims, and demands whatsoever” which the other parties to the deed might have against him with the usual reservation of rights against sureties. The plaintiffs and the ten firms and companies whose debts made up the sum claimed were parties amongst others, to the deed of assignment:—

HELD: (i) the release in the deed of assignment operated to release all the joint guarantors and the position was in no way affected by the reservation of rights against sureties.

(ii) “members of the association” meant members of the association or any incorporated company whose nominee or nominees is or are members of the association.

(iii) the association was entitled to sue for the benefit of the members entitled and as trustee for them.

(iv) “liabilities” in the guarantee meant all liabilities to individual members or to companies whose nominees were members.

[EDITORIAL NOTE.] Though this case is sufficiently decided by the principle that the release of one joint guarantor releases all, it contains an interesting consideration of the following points affecting trade associations, viz.: the right of the association itself to sue upon behalf of such members as may be creditors; the meaning of the term “member.” A guarantee having been given of a member’s “liability,” the latter term was considered and defined.

AS TO RELEASE OF JOINT GUARANTORS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 162-164, para. 200; and FOR THE CASES, see DIGEST, Vol. 26, pp. 200-202, Nos. 1566-1574.]

Case referred to:

(1) *Lloyd’s v. Harper* (1880), 16 Ch. D. 290; 13 Digest 276, 73.

ACTION to recover £40,477 6s. 5d. alleged to be due on a guarantee the terms of which are set out in the judgment. The guarantee was signed by four parties and the remaining signatories were made third parties.

W. P. Spens, K.C., H. U. Willink, K.C., and John Whyatt, for the plaintiffs.

Sir William Jowitt, K.C., and Philip Vos, for the defendant.

H. G. Robertson, Cyril T. Miller and Gerald A. Gardiner, for the respective third parties.

MACKINNON, J. : In this case the Liverpool Corn Trade Association Limited, sues Mr. Hurst, alleging that he is liable under a certain undertaking he incurred in a short document. That document is in these terms :

In consideration of your agreeing to admit Mr. Edward Albert Lessing as a member of your association, as the representative of our company, we hereby jointly and severally undertake to be personally responsible to you for the discharge of the liabilities and obligations of our company to members of the association, and for the consequences of all acts or omissions of the said Mr. Edward Albert Lessing while acting as such representative. Dated this 10th day of March, 1931.

That is signed by four persons, including Mr. Hurst. Mr. Hurst, therefore, having jointly and severally undertaken the liabilities under that document, is sued as liable for its fulfilment.

Now that document refers twice over to "our company" and there is no dispute that "our company" means the company called Strauss & Company, Limited, which was a private incorporated company. In order to understand the meaning of parts of this somewhat obscure document, it is necessary to bear in mind the constitution of the plaintiff company as exhibited in their memorandum and articles of association. That provided in short that the association was a limited company for the purpose, in effect, of promoting the interests of the corn trade, and that members or shareholders of that company should be members of the association by each being allotted a share, and providing that the shareholders and therefore the members could only be individuals ; but it also provided that companies, though not allowed to be shareholders and therefore not themselves to be members, might enjoy the benefits of an alliance with the plaintiff company by directors or nominees of the companies being shareholders and therefore members of the association. They make a difference in that a public company must have two representatives who shall be shareholders and members of the association, and a private company shall have one nominee who shall be a shareholder and member of the company. It is further provided as regards the nominee of a private incorporated company that he must not trade on his own account or on account of anyone except the incorporated company whom he represents. There are also rather elaborate provisions, which I need not read in detail, regulating the position of these members who are nominees of incorporated companies, among others a provision in art. 10A, an amended article, that in the case of every private incorporated company the directors of such companies

“shall be required before their nominee is admitted to membership to enter into a joint and several undertaking to be personally responsible for the discharge of the liabilities and obligations of the company to members of the association,” and so forth.

It was in pursuance of the requirement of that article that, having nominated Mr. Lessing to be their representative member and shareholder of the plaintiff company, the four directors, as they then were, of Strauss & Company, Limited, Mr. Strauss, Mr. Lessing, Mr. Hurst and Mr. Mendl, signed this guarantee. Another gentleman, Mr. Andrews, having subsequently become a director, signed a document on May 31, 1932, stating that he approved and adopted the undertakings entered into by the four gentlemen I have mentioned upon the admission of Mr. Lessing to membership in the association, “and I also do hereby undertake to be personally responsible to you, jointly with my said co-directors, and severally, for the discharge of the liabilities and obligations of my company to members of the association,” and so forth.

This action is brought by the association claiming to be entitled to sue as trustees for the members of this association in order to secure for those members the benefits of this guarantee of Mar. 10, 1931. The first question which arises is whether the plaintiff company, the association, is entitled so to sue. I need not discuss that matter in detail. I think they are. In so far as Mr. Hurst is liable under this undertaking to discharge the liabilities and obligations to members of the association, I think that the association is entitled, for the benefit of those members and as trustee for those members, to call upon Mr. Hurst to fulfil his obligation. That, I think, arises from the principle laid down in the well known case of *Lloyd's v. Harper* (1). I need not refer to that more in detail. The plaintiffs, therefore, in my view, can say to Mr. Hurst: “We can call upon you to discharge certain liabilities to our members and we so call upon you on account of those members.”

The next question that arises is: Who are members? Sir William Jowitt says, and in one sense it is a fact, that the only members of the association are the shareholders, and “shareholders” can only mean individuals. There probably do exist certain individuals who carry on business as traders in corn with whom Strauss & Company had, or may have had, certain contracts. The persons or corporations on whose behalf in fact this claim is made I believe do include one individual trader, trading as S. Ravenscroft & Company. There is, on the part of Ravenscroft & Company, a claim against Strauss & Company, Limited, for the small amount of £115 19s. 9d., but, with the exception of Mr. Ravenscroft, in his firm name, all the other claimants for whose benefit the plaintiff company is bringing this action, are incorporated companies whose claims are very much larger. The first limited company has a claim of over £20,000, and the second one for over £11,000. It is said

that those companies are not members of the association ; therefore, there is no liability of Strauss & Company, Limited, to members of the association. It must be borne in mind, as I have pointed out, that a member of the association who is a member by virtue of being a nominee of an incorporated company, is not allowed by virtue of art. 10c to do any business at all, or ever to do any business except on behalf and in the name of the incorporated company that he represents. It is perfectly obvious, therefore, that if "members" in this form of guarantee has the limited meaning which it is suggested it must have, the guarantee was in fact and at all times remained of very little commercial value at all. I do not think that "members of the association" ought to be given that very limited meaning. I think "members of the association" where it occurs is a succinct phrase, the real meaning of which is "members of the association or any incorporated company whose nominee or nominees is or are members of the association," and that when a liability or obligation of Strauss & Company has arisen to an incorporated company which has a nominee as a member of the association, that is a liability or obligation the fulfilment of which Mr. Hurst has guaranteed.

The next question is perhaps more difficult : What class of liability or obligation is referred to ? In terms there is no limitation and no definition. It simply says, "discharge of the liabilities and obligations of our company to members." Although I have not gone into the details of this claim, we have had a schedule of the various members or incorporated companies and nominee members in whose interest this action is brought. In fact, the liabilities of Strauss & Company are in respect of matters other than corn or any commodity that could be included in the definition of corn which appears in the articles. Coromandel groundnuts is one example ; indeed, there are very large dealings in that commodity. The cumulative amount, I gather, has arisen probably to a much greater extent in respect of things like groundnut kernels than in regard to wheat, maize, barley, rye, or other things that could strictly be called corn.

The majority of the contracts are not made upon forms issued by the Liverpool Corn Trade Association. In fact I am sure, from what I have seen, that the great majority of the contracts concerned giving rise to these liabilities and obligations are contracts of London associations, partly the London Corn Trade Association, still more largely the Incorporated Oil Seed Association, and various other similar trade associations.

I think this is a difficult question, but my chief difficulty is this. If I am in any way to limit the full generality of this phrase, "the liabilities and obligations of our company," I find it perfectly impossible to frame any sort of definition of that limitation. Various considerations might have applied, such as the place where the contract was made, the form

of contract upon which the bargain was concluded and the nature of the commodity. They all overlap one another and, personally, I do not in the least understand what is suggested to be the nature of the limitation, the extent of the limitation and the ground upon which such limitation should be based. Purely as a matter of construction, I do not think it is possible to give any smaller effect to these words than the meaning which they clearly bear, namely, any liability and any obligation arising from a contract between Strauss & Company, Limited, and a member of the association as the other contracting party, taking "member of the association" to have that more extended meaning which I have indicated.

Therefore, in that respect, again I should hold that this action was rightly conceived and that the plaintiffs were entitled to sue, and, if there had been no other document, or no other had come into existence, and if no other incident had taken place in the history of Strauss & Company, Limited, or the signatories to this guarantee, or the action of the plaintiff company, I should think the plaintiff company were entitled to recover in this action. But there remains another point, which is totally different, and that is this.

On Jan. 28, 1935, Mr. Strauss assigned the whole of his property, with certain exceptions, for the benefit of his creditors. In consideration of that assignment para. 18 contains a release of the liability of Mr. Strauss as a debtor to those creditors in these terms :

In consideration of the premises the creditors do and each of them doth hereby respectively release the debtor from all debts, claims and demands whatsoever which the creditors or any of them respectively now may have or but for this release might hereafter have against the debtor in respect of any debt, contract, transaction, matter or thing incurred, done or suffered before the date hereof.

Among the creditors in the schedule there appear the various companies who appear in the document to which I have been referring as the *cestui que* trust on whose behalf the plaintiffs are making their claim against Mr. Hurst in this action. The first one in sched. 2 to assent to this deed as a creditor is the company Frank Fehr & Company, for £20,000 odd. Their signature of assent is followed by that of the directors of the Liverpool Corn Trade Association, Limited, who state that they "concur in the above assent." That is on May 3. The second assent is by Messrs. Bunge, the sum in respect of which the association is now suing Mr. Hurst for payment being £11,898. It is quite clear that those debts of Mr. Strauss are his debts as one of the co-signatories of this guarantee, and in respect of those debts of Mr. Strauss the various creditors, including Messrs. Fehr and Messrs. Bunge, release Mr. Strauss from his debts. The liability of Mr. Strauss for those debts is simply because he is one of those four (now five) signatories who jointly and severally undertook these obligations. It is quite obvious that that

being a joint liability, if Mr. Strauss as one of the joint debtors is released, his release, unless there be something to prevent it, would release the other joint debtors, and if this part of the deed, executed by Mr. Strauss and assented to by the present plaintiffs and those on whose behalf they sue, stood alone, it is quite clear that the release of Mr. Strauss would release his co-guarantors and would, therefore, release Mr. Hurst.

The question is whether, notwithstanding that release of Mr. Strauss, there has been a sufficient reservation of the liability of Mr. Hurst so that, notwithstanding the release, Mr. Hurst can now be sued. That is to say, that there is such a reservation in the third sub-paragraph of clause 18, which is in these terms :

The release to the debtor hereinbefore contained shall not prevent any of the creditors from suing any other persons who may have become bound as sureties for the debtor or who are in any manner liable for the payment of any debts of the debtor but the creditors and each of them shall have the same remedies against any such sureties or other person as the creditors might have had if this deed had not been made.

It is quite clear (and it is not disputed) that Mr. Hurst is not a surety for Mr. Strauss. He is not a surety for Mr. Strauss. He is a joint debtor with Mr. Strauss. It is not a primary liability of Mr. Strauss which Mr. Hurst guarantees and, therefore, the first part of that clause does not apply. It is impossible to suggest that Mr. Hurst is being sued as a person who has become bound as surety of Mr. Strauss. Therefore, that first part of the clause does not apply.

It is said that the effect of the subsequent words is enough to reserve a right, notwithstanding the reference to Mr. Strauss as one of the joint debtors, to sue another of them, for instance, Mr. Hurst. That must be because these words are applicable—

The release to the debtor hereinbefore contained shall not prevent any of the creditors from suing any other persons who may have become bound as sureties for the debtor or who are in any manner liable for the payment of any debts of the debtor—

that is, any person who is liable for the payment of any debt due by Mr. Strauss. I cannot see that Mr. Hurst is in any way a person who is liable for the payment of Mr. Strauss' debts. He is liable, if at all, under this as himself a debtor just as much as Mr. Strauss, and if the joint debt due by Mr. Strauss and Mr. Hurst is released to one of them, it is equally released to the other of them unless there are, in my judgment, clear words showing that there is not intended to be a release of the other joint co-debtors so that they can be sued and Mr. Strauss, notwithstanding the release to him, can be made liable at their suit to contribute to that which they may be made to pay. I think that to secure that result clear words are necessary. I do not think these words are in the least

clear. The actual words, "who are in any manner liable for the payment of any debts of the debtor," seem to me inapplicable to cover the liability of Mr. Hurst as a joint debtor with Mr. Strauss and, if they are so inapplicable in their clear wording, I do not think it is my duty to torture them into a meaning other than that which they clearly bear, so as to cover the position as it really exists in this case. Then it is said : It may be said that this is a sum of money for which Mr. Strauss and Mr. Hurst are both liable ; therefore, we must regard this as a debt of Mr. Strauss for which Mr. Hurst is liable. I do not think that is the proper meaning to attribute to it. I think that the words of the release in the early part of para. 18 are perfectly clear. The effect of that release is also perfectly clear, and if the effect is not to be given its proper legal result, there must be other words that affect it. I do not find those other words, and the result is, I think, that this action fails by reason of the execution by the plaintiff company—it does not matter that it is executed also by those on whose behalf avowedly the plaintiff company now brings this action—of that release to Mr. Strauss and any right of action against the other gentlemen on joint guarantees thereby came to an end.

For that reason, and for that reason only, I think this action fails. The result is that there must be judgment for Mr. Hurst with costs and, as the necessary result is that Mr. Hurst's claim to contribution from third parties also disappears because he is not liable, there must in turn be judgment for the third parties.

Solicitors : *Thomas Cooper & Co.*, agents for *Laces & Co.*, Liverpool (for the plaintiffs) ; *Judge, Hackman & Judge* (for the defendant) ; *Richards, Butler, Stokes & Woodham Smith* (for the third parties, Mendl and Andrews) ; *Bird & Bird* (for the third party, Strauss) ; *A. M. Longhurst & Butler* (for the third party, Lessing).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister at-Law.*]

**RE THE RAILWAYS (VALUATION FOR RATING) ACT, 1930 ;
APPLICATION BY THE RAILWAY ASSESSMENT
AUTHORITY AND OTHERS.**

[RAILWAY AND CANAL COMMISSION (MacKinnon, J., Sir Francis Taylor, K.C., and Sir Francis Dunnell), **April 27, 28, 29, 30, May 1, 4, 5, 1936.**]

Railways—Railway and Canal Commission—Review of order—Railway and Canal Traffic Act 1888 (c. 25) s. 18 (2)—Rules of Procedure, 1924, r. 69.

The Railway and Canal Traffic Act, 1888, s. 18 gives the Railway and Canal Commission power to review rescind or vary any order which it has made. Under this provision orders may be varied owing to change of circumstances and may be varied at any time upon proper evidence of such change. Under the Rules of Procedure, r. 69 an order may be varied upon an application made within 28 days of the decision for the purpose of correcting any accidental slip or miscalculation in it. The two applications are, however, distinct, and an application to correct a miscalculation, especially in a case of great magnitude and complexity, must be made promptly and an application for "re-argument" is not within the rule.

[**EDITORIAL NOTE.** In *Railway Assessment Authority v. Southern Railway Company* [1936] 1 All E.R. 26, VISCOUNT HAILSHAM, L.C., dealing with a suggestion that there had been a miscalculation referred (at p. 39) to the power of the Railway and Canal Commission to entertain the application here made. The application when made, however, was held to amount to more than a suggestion of miscalculation and was in consequence refused.

AS TO THE REVIEW OF ORDERS BY THE RAILWAY AND CANAL COMMISSION, see HALSBURY, 1st Edn, Vol. 23, Railways, p. 759, para. 1602, and FOR CASES see DIGEST, Vol. 38, p. 367, Nos. 685-688.]

APPLICATIONS by the Railway Assessment Authority, the London County Council, the Middlesex County Valuation Committee, the Croydon Corporation, and the Brighton Corporation to the Court of the Railway and Canal Commission for leave to apply for a review of its order, dated Feb. 6, 1935, notwithstanding the expiration of 28 days therefrom, and for a review of the order. The rule under which the application was made is fully dealt with in the judgment of MACKINNON, J., and the nature of the application is set out in the judgment of SIR FRANCIS TAYLOR, K.C.

Sir William Jowitt, K.C., Sir Stafford Cripps, K.C., and Erskine Simes, for the applicants, the Railway Assessment Authority.

Sydney G. Turner, K.C. and Michael E. Rowe, for the other applicants, the London County Council, the Middlesex County Valuation Committee, the Croydon Corporation, the Brighton Corporation ;

W. E. Tyldesley Jones, K.C., Walter T. Monckton, K.C., A. M. Trustram Eve, K.C., and Alfred Tylor, for the respondents, the Southern Railway Company.

MACKINNON, J. : In this case this court delivered judgment on Feb. 6, 1935. On Feb. 6, 1936, exactly one year later, the Assess-

ment Authority issued a notice of motion asking for a review and variation of the order made by this court. By the Railway and Canal Traffic Act, 1888, s. 18, this court is given express power to "review, rescind or vary" any order which it has made. That is an exceptional power not enjoyed by other courts. The only power of altering a judgment possessed by a judge of the King's Bench Division is under what is called the Slip Order, R.S.C. Ord. 28, r. 11, by which he can amend his judgment in respect of any accidental error. It is obvious that action under that sort of power should be taken promptly after the delivery of the judgment alleged to be impaired by an error when the facts and considerations are still more or less fresh in the mind of him who has committed the error. I conceive that this court has a similar power, quite apart from sect. 18 of the Act of 1888, to correct an accidental error in any order it has made; and it is no doubt this sort of application which is contemplated by our Rules of Procedure, No. 69, which provides that an application to amend or review an order must be made within 28 days of its being made. The power of review and variation contemplated by sect. 18 of the Act of 1888 is, I think, of a totally different nature. Circumstances may in the course of time change, so that an order made by this court may no longer lay down the most convenient or feasible method of working a railway, or, under the modern extension of our jurisdiction, the operations of a coal mine. It is very convenient, therefore, that a party shall be given by the section power to apply to the court, and, upon evidence adduced of the change of circumstances, to secure a variation of an order. To this type of application the limit of 28 days in r. 69 is obviously inapplicable and impracticable; and in an application of this type we have expressly said that r. 69 was not meant to apply, or will not be allowed to apply, by us. There are, therefore, two types of application to review, firstly, one based upon a suggestion of an accidental error in its judgment made by the court in considering the evidence heard in the case; secondly, upon a suggestion of new facts having arisen, an application for a different sort of order based upon proof of those new facts. The first is obviously one that should be made promptly after delivery of the judgment: the r. 69 very reasonably says in 28 days. The second, equally obviously, cannot be made until sufficient time has elapsed for the new facts or circumstances to arise that justify it.

Now the application to review and vary our order made in this case is essentially one of the first type, and is in no sense one of the second type. It is based upon a suggestion that upon the evidence at the original hearing this court, having enunciated the principles upon which it intended to assess the valuation it had to make, made an error, or series of errors, in applying those principles to the evidence it heard. It is therefore of the type which obviously, as I have said, ought to be made promptly after delivery of the impugned judgment, and, under our r. 69,

within 28 days. In this particular case the importance of such promptness is as great as it can possibly be, for it was one of great magnitude and complexity. The hearing before us lasted from Dec. 10, 1934, to Jan. 23, 1935. We listened to 20 witnesses upon eight days in Dec. 1934, and one day in Jan., 1935. In the course of their evidence those witnesses produced 65 tabular statements, many of which were of a most elaborate nature. The evidence, therefore, which we had to consider was to the last degree lengthy and complicated. On Apr. 21, 1936, Sir William Jowitt opened his motion asking us to say that when we were considering that vast mass of evidence and figures before delivering our judgment we made accidental errors of calculation: he so asked us in short one year and 131 days after we began to hear the evidence, and one year and 75 days after we delivered our judgment. For my own part, when Sir William Jowitt opened his motion I had only a vague general recollection of the mass of evidence I listened to 14 or 15 months ago, and of the considerations I applied in arriving at my judgment; and of the details of that evidence, and of those considerations, I had no recollection at all.

In these circumstances I cannot think we could be blamed if we said that the application must be refused on the ground that it was altogether too late and that to attempt to deal with it imposed on us an impossible task. But great interests are involved in this case, and very large sums of money were at stake. The respondents waived any desire to rely upon any right of objection they might possess under r. 69. And the applicants were to some extent encouraged by the opinion of the VISCOUNT HAILSHAM, L.C. in the House of Lords to bring on this motion before us. It is right to add that any such encouragement was given in the light of an assertion by the present applicants that they could demonstrate mathematically upon figures accepted at the hearing that we had made errors of calculation in applying such figures.

We accordingly thought it was proper to hear the application upon its merits, and at length, and we listened to arguments for four days from Sir William Jowitt, Sir Stafford Cripps and Mr. Tyldesley Jones. Those arguments on the part of the applicants certainly did not amount to a demonstration that upon figures that were not in controversy at the hearing we had made mathematical errors of calculation. Sir William Jowitt, in fact, advanced a re-argument, and an entirely new argument, upon parts of the mass of evidence in the case, fortified by yet another elaborate tabular statement, at least as elaborate as the majority of the 65 that I mentioned before. This statement admittedly was the work of some expert adviser, who had gone through the evidence and laboriously prepared it. Mr. Tyldesley Jones saw it only during the second day of Sir William Jowitt's speech, and if his recollection of the contents of the prints of the nine days' evidence was even twice as good as my own

he must have had a hard task to check and follow the details of the new statement. Yet he was able, on the next day, to demonstrate that many of the facts relied on in the new table were matters of acute controversy. In short he demonstrated that this document was in truth a re-argument, and a wholly new method of argument, upon materials that were in controversy before.

I have spoken of "re-argument, and a wholly new argument." It is important to remember that at the hearing of the case the efforts of Sir William Jowitt and Sir Stafford Cripps were mainly directed to persuade us that we ought not to adopt the profits basis, as it has been called, but a different method of calculation. We did not agree with that contention and the House of Lords has said that we were right. But it not unnaturally followed that, having that other main object in view, Sir William Jowitt bestowed less time and care upon the question, "If the profits basis is adopted, what are the precise factors to consider in the resulting calculation?" It has been that omission which in his re-argument Sir William Jowitt has with his usual ability sought to provide. And I call it a new argument because it did import a number of considerations which at the original hearing were never even mentioned, a fact which Sir William Jowitt avowed with his customary candour.

I do not propose to refer in detail to the various points in the notice of motion. Sir Francis Taylor, whose judgment I have had the advantage of reading, deals with the more important of them. My conclusion upon this matter is this. The task that was originally set us was not one in which precise mathematical calculations were possible. That would have involved separately valuing some millions of articles of the railway's multifarious equipment. And if two human beings, both of an intellect equal to Sir Isaac Newton's, separately essayed our task upon the evidence we heard, they could not possibly have arrived at precisely the same result. When, after the original hearing, I worked at masses of figures I arrived at a resulting figure which was not the same as that reached by Sir Francis Dunnell, nor was it arrived at by me in exactly the same way as by him. But my resulting figure was so near his—whether higher or lower I forget—that I did not think it worth while to add a discussion of the figures to my judgment upon the law, and contented myself by saying that I agreed with him. And my own pages of figures and calculations went into the waste paper basket some 15 months ago. Having heard this re-argument, and new argument, from Sir William Jowitt, I have a feeling that if from the beginning he had accepted, and not contested, the principle now held by the House of Lords to be correct, and had used his great gifts only in assisting us to apply that principle to the figures, there is a possibility that we might have arrived at a conclusion more favourable to his clients than we did. I say there is a possibility. But I must also remember that upon these

new arguments I have only heard one side fully. Sir William Jowitt had the advantage of having an elaborate restatement of parts of the evidence made for him, at some time during the year or more, by his unnamed expert adviser. Mr. Tyldesley Jones, who saw it for the first time the night before he addressed us, was obviously at the greatest disadvantage.

Having listened attentively to all that was said, I am not satisfied that I made any mistake at all. But what presses me more than anything is that at this date this motion really asks me to do that which is impossible, namely, either to annihilate the passage of time and have my mind refilled with all that was in it 15 months ago, or else to start afresh and spend many months in a laborious re-reading of the printed record of ten days in Dec., 1934, six days in Jan., 1935, and four days in Apr., 1936. If I did so I do not suppose I should arrive at precisely the same figure as I announced on Feb. 6, 1935. It might be more, as Sir William Jowitt says it ought to be. But I am not even satisfied with any certainty that it might not be less.

In these circumstances I cannot do otherwise than say that this motion fails and must be dismissed with costs.

SIR FRANCIS TAYLOR : The notices of motion specify certain matters which, it was submitted, the judgment of the court failed to have regard to, namely : (a) Lower rates during the quinquennial ; (b) The Railways Act of 1921 and the Local Government Act, 1929 ; (c) The presumption of the existence of a staff and management available for the hypothetical tenant ; (d) The expenditure on hereditaments by the landlord since 1929—not reflected in the average net receipts for 1928 and 1929 ; (e) The company as a possible tenant ; and also certain matters, which it was submitted that the judgment of the court wrongly had regard to, namely : (a) The largeness of the sum to be supplied by the hypothetical tenant ; (b) The difficulty of finding a tenant with such extensive means ; (c) The difficulty of reinvestment of so large an amount of capital by the hypothetical tenant on expiration of tenancy ; (d) The difficulty of realising the hypothetical tenant's stock. The House of Lords was not satisfied that any one of these submissions was made out, or that this court failed to have regard to or wrongly had regard to any of them, or excluded from consideration any matter which ought to have been included or included anything which should have been excluded ; and this view was arrived at after prolonged examination and discussion. We agree with Mr. Tyldesley Jones' submission that it is sufficient to say that the judgment of the House of Lords is an answer to the motions so far as they are based on these points and that it is unnecessary to give any other answer.

There remains the problem—presented more than a year after our judgment—whether, in the light of the judgment of the House of Lords,

a due degree of weight was attributed to the relevant considerations enumerated in the first of the heads, (a), (b), (c), (d) and (e), above mentioned, and also whether now, after a most skilful review of the evidence, or some of it, relating to these matters, we can and ought to increase the weight properly to be attached to them or any of them. It is an impossible task to recall with any approach to certainty the estimate of the degree of weight attributed by us to these matters which resulted in our judgment of last year. If the critical examination of them which we have just heard had been addressed to us before the judgment, when we had a more vivid recollection of the whole of the evidence and of the relation of the different parts to each other, to be gleaned only by intensive study of numerous documents, the examination of many witnesses, and complicated accounts and tables, it would indeed have been valuable, and it is quite possible the result might have been different. My apprehension is that now there may be more risk of error in attempting to estimate the degree of weight that ought to be attributed to these relevant circumstances by concentration upon the isolated pieces of evidence, which have been dwelt upon, forgetfulness of others, and loss of the full perspective view of the whole case.

The question of the smaller sum to be paid for rates is to be regarded as one of the factors in the estimation of the tendency towards improvement or the reverse. That tendency was fully considered and we had the tables relating to the years after 1929 before us. The point as to the difference between the £937,000 and the lower rates was not specifically considered by itself, and that is not surprising after the mode in which that matter was introduced and handled. To take that point by itself—without relation to other factors of tendency—and to diminish the rate of percentage by 1 per cent. on that ground seems to be unreasonable and might well be unjust. Similar observations may be made on the question of capital expenditure by the landlord since the year 1929. The point as to the presumption of staff and management available for the hypothetical tenant was discovered in that passage in my judgment relating to “vacant premises.” The House of Lords placed a construction on that passage adverse to such discovery. I might content myself with that, but I will add what appears to be justified by the remarks of some of their Lordships during the argument, that, if the passage in question had been intended by the author to mean that which was contended for, the percentage on the tenants’ capital ought to have been much larger. We agree with Mr. Tyldesley Jones that the statutes of 1921 and 1929 imposed fetters rather than bestowed advantages. The point as to the company being a possible tenant was regarded, fully considered and expressly dealt with in the judgments.

As to the alleged mathematical error and the set of tables entitled “Analysis of the judgment,” after hearing the argument and considering

the passages in the shorthand notes referred to on both sides, it is impossible to treat the figures as rigid and as being figures which the court is bound to accept. We are not satisfied that Mr. Marsh, on whose evidence the figures are based, ever did accept them as final and unalterable figures. The matter is very complicated and it would require a very prolonged investigation to settle. The document was produced almost at the last moment and those who were affected by it had little time or opportunity for criticism, but such criticism as was under the circumstances possible disposes us to think that the contents should be examined with great detail and much care and scrutiny and in the result we are not prepared to accept them, nor to displace our own method and calculation in favour of the figures and results shown in the "Analysis of the judgment."

For these reasons I agree with the judgment that my Lord has pronounced.

SIR FRANCIS DUNNELL : I am in entire agreement with the judgments which have been delivered by the learned judge and Sir Francis Taylor, and there is nothing that I wish to add to them.

Solicitors : *Torr & Co.* (for the applicants, the Railway Assessment Authority) ; *Sharpe, Pritchard & Co.* (for the other applicants) ; *W. Bishop* (for the respondents).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

Observations of LORD RUSSELL OF KILLOWEN, at p. 329, applied. JOHN LAING & SON, LTD. v. KINGSWOOD ASS. COM. [1948] 1 All E.R. 43.

Dicta of LORD RUSSELL OF KILLOWEN at p. 326, applied. HELMAN v. HORSHAM AND WORTHING ASS. COM. [1949] 1 All E.R. 776.

WESTMINSTER CITY COUNCIL v. SOUTHERN RAILWAY COMPANY AND OTHERS.

WESTMINSTER CITY COUNCIL AND OTHERS v. SOUTHERN RAILWAY COMPANY AND OTHERS. (CONSOLIDATED APPEALS).

[HOUSE OF LORDS (Lord Russell of Killowen, Lord Macmillan and Lord Wright, M.R.), **February 24, 25, 27, 28, March 2, 3, 5, 6, and May 20, 1936.**]

Rating—Railway hereditaments—Premises let at railway stations—Whether capable of separate assessment—Railways (Valuation for Rating) Act 1930 (c. 24), s. 1 (3).

Certain premises at Victoria Station, including a bank, offices, stores, shops, tobacco and confectionery kiosks, bookstalls and advertisement show cases, and certain buildings and storage areas at Beckenham Junction, were let out by the railway company to tenants under leases or licences. The effect of these leases or licences was in short that these various premises were of the nature of lock-up shops within the station premises of the company :—

HELD : the grantees had such *de facto* and exclusive occupation of the premises that they were "so let out as to be capable of separate

assessment " within the meaning of the Railways (Valuation for Rating) Act, 1930, s. 1 (3), and the premises were not railway hereditaments rateable as part of the railway undertaking.

Smith v. Lambeth Assessment Committee (7) overruled.

[EDITORIAL NOTE.] This case considers the principle laid down in *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (6) that where more persons than one have rights in a hereditament, that person who has the right of regulation and control over the other persons enjoying subordinate rights is the rateable occupier. In the present case the principle is considered in rather a narrower aspect, and it is held that it is not a question of who is in paramount occupation of the whole premises, where the premises to be assessed are part of a larger whole, but who is in paramount occupation of the actual premises to be rated.

FOR THE PRINCIPLE, see HALSBURY, 1st Edn., Vol. 24, Rates, pp. 4, 5, para. 2 ; and FOR CASES, see DIGEST, Vol. 38, pp. 444-448, Nos. 147-163. FOR THE RAILWAYS (VALUATION FOR RATING) ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 455.]

Cases referred to :

- (1) *Allan v. Liverpool, Inman v. Kirkdale* (1874), L.R. 9 Q.B. 180 ; 38 Digest 445, 155.
- (2) *Rochdale Canal Co. v. Brewster*, [1894] 2 Q.B. 852 ; 38 Digest 447, 160.
- (3) *Young & Co. v. Liverpool Assessment Committee*, [1911] 2 K.B. 195 ; 38 Digest 448, 162.
- (4) *London & North Western Railway Co. v. Buckmaster* (1875), L.R. 10 Q.B. 70, 444 ; 38 Digest 446, 156.
- (5) *Cory v. Bristow* (1877), 2 App. Cas. 262 ; 38 Digest 451, 178.
- (6) *Holywell Union & Halkyn Parish v. Halkyn Drainage Co.*, [1895] A.C. 117 ; 38 Digest 424, 7.
- (7) *Smith v. Lambeth Assessment Committee* (1882), 10 Q.B.D. 327 ; 38 Digest 446, 157.
- (8) *London & North Eastern Railway Co. v. Glasgow Assessor*, [1936] S.L.T. 181.
- (9) *North British Railway Co. v. Greig* (1866), 4 Maeph. (Ct. of Sess.) 645 ; 38 Digest 545, Case (l).
- (10) *David Allen & Sons Billposting, Ltd. v. Clydebank Assessor*, [1936] S.L.T. 163.
- (11) *Aberdeen Assessor v. Collie*, [1932] S.C. 304 ; Digest Supp.
- (12) *Lancashire Telephone Co. v. Manchester Overseers* (1884), 14 Q.B.D. 267 ; 38 Digest 442, 135.
- (13) *Smith v. St. Michael, Cambridge, Overseers* (1860), 3 E. & E. 383 ; 38 Digest 444, 150.
- (14) *Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181 ; 42 Digest 897, 73.
- (15) *London County Council v. Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee*, [1893] A.C. 562 ; 38 Digest 429, 42.
- (16) *West Kent Main Sewerage Board v. Dartford Union Assessment Committee, etc.*, [1911] A.C. 171 ; 38 Digest 440, 112.
- (17) *West Ham Union v. Edmonton Union*, [1908] A.C. 1 ; Digest Supp.

APPEALS direct from two orders of the Railway and Canal Commission Court on questions of law by virtue of the Railways (Valuation for Rating) Act, 1930, s. 9 (2) (b).

The first appeal was by the Westminster City Council and the second by the Westminster City Council and County Valuation Committee of

Kent. The Southern Railway Company and the Railway Assessment Authority were respondents in both appeals, and in the first appeal W. H. Smith & Son, Ltd., were also respondents.

The Railway Assessment Authority had treated the premises referred to in the first appeal as being part of the railway hereditament and therefore rateable as part of the railway undertaking. The Westminster City Council thereupon appealed to the Railway and Canal Commissioners who dismissed the appeal. The premises which were the subject of the second appeal were treated by the Railway Assessment Authority as not being parts of railway hereditaments, and therefore rateable separately. The Southern Railway Company appealed to the Railway and Canal Commissioners who allowed the appeal. Thereupon these appeals were brought.

The facts and the arguments are fully referred to in the judgments.

A. S. Comyns Carr, K.C., and *Michael E. Rowe* for the appellants.

W. E. Tyldesley Jones, K.C., *Walter T. Monckton, K.C.*, *A. M. Trustram Eve, K.C.*, and *Alfred Tylor* for the respondents, the Southern Railway Co.

Sir Stafford Cripps, K.C., and *Erskine Simes* for the respondents, the Railway Assessment Authority.

R. M. Montgomery, K.C., and *Arthur Capewell* for the respondents, W. H. Smith & Son, Ltd.

LORD RUSSELL OF KILLOWEN: My Lords, my noble and learned friend LORD WRIGHT, M.R., has prepared, and allowed me to peruse, an opinion upon the subject of these appeals, which deals in detail with the points raised and argued before us, and states the conclusion to be reached in regard to each of the premises in question in these appeals. While I agree with his reasoning and conclusions, except as to one comparatively unimportant matter, I have thought it advisable to add some observations of my own.

The questions which we have to decide may be said, if envisaged from one point of view, to arise for decision for the first time: but looked at from another angle their solution involves a consideration of former authorities on the question of rateable occupation. They are, however, essentially new questions for we have to decide for the first time whether premises are so let out as to be capable of separate assessment. The Railways (Valuation for Rating) Act, 1930 (which may be conveniently referred to as the Act of 1930) put an end to the system of valuing railways for rating purposes which was formerly prevalent in England, and under which each rating authority valued separately the section of the railway situate within the limits of its own area. The Act of 1930 created a new rating authority, called the Railway Assessment Authority, whose duty it is to prepare at intervals a railway

valuation roll showing the net annual and rateable values of every "railway hereditament" in England; the particulars relating to each railway company being entered in a separate part of the roll. Having ascertained the net annual value of the undertaking as a whole, the authority has to apportion that value among all the railway hereditaments in England occupied by that railway company. The relevant matter to note is that nothing which is not a "railway hereditament" is to be included in the roll. Any hereditament which is not a "railway hereditament" is liable to be rated by the appropriate authority, under the general law of rating.

The crucial provision of the Act of 1930 at this point comes into view, viz., the definition of "railway hereditament." It runs thus :

"Railway hereditament" means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company : provided that no premises occupied as a dwelling-house, hotel or place of public refreshment or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament.

Other parts of the Act of 1930 make it clear, in my opinion, that nothing can be a "railway hereditament" unless it is occupied by the railway company; and it was common ground in the arguments addressed to us that the word "capable" in the proviso meant capable both in fact and in law. Further it is to be observed that by the words "subject as hereinafter provided," the proviso is incorporated into the definition. Three results would appear to follow : (1) that premises, by whomsoever occupied, if occupied as a dwelling house, hotel or place of public refreshment can never be deemed to be or form part of a railway hereditament; (2) that no premises which, according to law, are in the rateable occupation of some person other than the railway company can be deemed to be or to form part of a railway hereditament; and (3) that such premises might in fact form part of a railway hereditament. It was contended before us that the effect of this statutory definition, by virtue of its reference to capability of separate assessment, gave statutory recognition and effect to certain decided cases, with the result that your Lordships were in some way bound to treat them as correctly decided, and unable to give effect to a contrary view, should you happen to be convinced that such contrary view was right in law. I can attribute no such effect to the definition. It is open to your Lordships to declare what you conceive to be the law, unhampered by any statutory restriction.

Before considering the particular circumstances affecting the respective premises which are the subject of this appeal, I would in the first place call attention to the Southern Railway Act, 1924, s. 91. Under that section the Southern Railway Company, has power to

build . . . shops . . . offices or any similar buildings . . . on . . . any station

or railway of the company . . . and to . . . sell demise let or otherwise dispose of the freehold or any other interest of or in any buildings or any part or parts of buildings erected or to be erected . . . over any such station . . . of the company or on the site thereof, and also to demise let or otherwise dispose of the right to build . . . on . . . any such station or railway or upon the sites thereof respectively

In other words it has power to carve out of any station separate premises, which though still within the precincts of the station and in one sense forming part of it, may yet be disposed of to others, even for an estate in fee simple. The great majority of the premises which are the subject of this appeal have been so carved out, and are in fact situate within the precincts of Victoria Station. They may nevertheless, though themselves within the confines of the station, which itself is a railway hereditament, neither be a railway hereditament nor even form part of a railway hereditament, if they are "so let out as to be capable of separate assessment."

In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below. The occupier, not the land, is rateable; but, the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact, viz., whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate; but who is in paramount occupation of the particular premises in question.

A familiar instance of this competing occupancy is the case of the lodger. It has long been settled on the one hand that, in the case of lodgers in a lodging house, the lodgers are not rateable in respect of their occupancy of their rooms, but that the landlord is the person who is rateable in respect of his occupancy of the entire house. In view of the frequently fleeting nature of the occupancy of a lodger, the convenience

of this view, indeed the necessity for it, is obvious ; but it purports to be based upon the paramountcy of the landlord's occupation, arising from his control of the front door and his general control over and right of access to the lodgers' rooms for the proper conduct of the lodging house. And the same view as to rateability has prevailed in the case of the business lodger. On the other hand the occupation of a person residing in a flat is such that he is (generally speaking) rateable, although as a matter of practice, the owner of the block of flats usually pays the rates charging the tenant an inclusive rent. My lords, I cannot but feel that the position of the lodger in relation to rateability is an exceptional one, and is largely the product of practical considerations. But it can I think be justified and explained when we remember that the landlord, who is the person held to be rateable, is occupying the whole premises for the purpose of his business of letting lodgings, that for the purpose of that business he has a continual right of access to the lodgers' rooms, and that he, in fact, retains the control of ingress and egress to and from the lodging house, notwithstanding that the power of ingress and egress at all hours, is essential to the lodger. The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation ; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts.

What I may call the landlord-control principle has been applied to cases other than lodgers. Thus in *Allan v. Liverpool* (1) and *Rochdale Canal Co. v. Brewster* (2) the Mersey Dock Board were held to be in rateable occupation of premises (part of their dock system) which they had appropriated to the use of others. In each of these cases the true ground of the decision was, I think, that *the use* to be made of the appropriated premises by the occupiers thereof was subject to the general control of the Dock Board. LOPES, L.J., in *Rochdale Canal Co. v. Brewster* (2) at p. 858 put it thus :

In this case I have come to the conclusion that there is such a predominating right of control reserved to the board as to prevent the occupation being so exclusive as to be rateable. In my judgment, what passed to the respondents was the licence to use the accommodation of the cranes, quays, land and water berths subordinated to the superintending control of the board—a mere incorporeal right. They could not exclude the board.

The Lord Justice is pointing out in other words that the Board had retained the right of control over the use made of the appropriated part by the occupants thereof. On the other hand a different result was reached in the case of *Young & Co. v. Liverpool Assessment Com-*

mittee (3). There such rights as were reserved to the Mersey Dock Board did not involve any control over or interference with the carrying on of their business on the appropriated parts by the occupants thereof. Another case to be noted in this connection is the *L. & N.W. Railway v. Buckmaster* (4). I confess that I regard that authority as unsatisfactory. BLACKBURN, J., held that the railway company had while giving a right to the Clay Cross Company to put horses in the stable, retained themselves such control over the stable, that the Clay Cross Company had not exclusive occupation. In coming to this conclusion he relied upon a clause binding the Clay Cross Company to observe the byelaws and regulations for the use of the railway company's stations, premises and conveniences. QUAIN, J., agreed with hesitation, though he seems to have thought that the agreement was merely one to provide stabling accommodation. He relied, however, on the byelaws clause and upon the railway company's control of the outer gates. ARCHIBALD, J., also agreed but upon the ground, insufficient *per se*, that the agreement was not a demise but a mere easement of occupation. In the Exchequer Chamber the six judges were equally divided with the result that the decision below stood. Three judges held that the railway company were rateable because they retained control of the stables: the other three held that the Clay Cross Company had occupation and possession of the particular premises, and were rateable accordingly. For myself I would have decided in accordance with the latter view; but from any aspect the authority is an unsatisfactory one and well deserved the reservation of opinion expressed by BRETT, L.J., in the later case relating to Smith's bookstalls. Moreover having regard to the views which prevailed in *Cory v. Bristow* (5) it would seem that too much weight was attributed to the clause as to observance of byelaws. In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons.

Before I turn to a consideration of the particular premises in Victoria Station (or some of them) which are here in question, let me say at once that I regard the forms of the documents under which they are "let out" as of small importance. There can I think be no doubt that a view once prevailed that in order to constitute rateable occupation it was necessary that the occupier should be in the position of a tenant of the land; and that a mere license to occupy, or a title to occupation in virtue of a right in the nature of an easement was not enough. Further, although authorities had established that the existence of a tenancy

was not necessary, but that rateable occupation could exist in one who occupied only by virtue of a license or easement, the old error still prevailed at times. Thus in the case of the *Holywell Union & Halkyn Parish v. Halkyn Drainage Co.* (6), although a Divisional Court had held that the company's easement involved occupation of such a character as to be rateable occupation (see 69 L.T. 112) the Court of Appeal reversed the decision on the ground that an easement was not subject to rate, and that since the ownership of the tunnel had not been conveyed to the company but only an easement in it, the company had nothing in respect of which it was liable to be rated (see 69 L.T. 705). The House of Lords restored the order of the Divisional Court, holding that the occupation which the company enjoyed under their deed for the purpose of drainage was exclusive and therefore rateable. In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement.

I now turn to consider the premises in Victoria Station other than Smiths' bookstalls. These require separate consideration for reasons which will hereinafter appear. One group of these consists of separate premises of a permanent character not forming part of a building used by the railway company for its own purposes. An instance of this is the National Provincial Bank. I feel no doubt that this is not a railway hereditament. Indeed the only argument of substance in favour of the contrary view was the fact that it was within the station precincts, and that therefore access thereto was cut off during the few hours at night when the station was closed. This it was said was the control which reduced the National Provincial Bank to the position of a lodger in their banking premises and demonstrated that their occupation thereof was merely subordinate to that of the railway company. A strange situation surely for a bank. Indeed this was the only argument of substance in regard to any of the premises of this class. But for this shutting off of access at night-time they would all be in substantially the same position as the two shops as to which the railway company abandoned their appeal before the Railway and Canal Commission and which the railway company has conceded are not railway hereditaments. I cannot, however, accede to the view that because the bank could not, without the consent of the railway company, get to the bank premises during a few hours in the middle of the night, in which no banker would normally desire to go to his bank, and throughout which hours the bank is in fact occupying the premises by means of its goods and furniture, therefore the paramount occupant of the bank premises is the railway company, and the occupancy of the bank is a merely subordinate affair. Other features affecting the bank's occupancy upon which some reliance

were placed were (1) that the railway company may decide upon the line of approach to be used by the bank and their employees in going to the premises ; (2) that the railway company reserve certain rights for the purpose of controlling pipes and cables which run through under or over the premises ; and (3) that the bank must observe the bye-laws and regulations as to the management of the station, and the requirements of the stationmaster for the management of the station business and traffic. I can find nothing in these provisions inconsistent with the bank having and enjoying the exclusive occupation and possession of the bank premises for the purposes for which they are occupied, viz., for the purposes of a bank. In my opinion the bank premises are so let out as to be capable of separate assessment ; they are not a railway hereditament within the meaning of the Act of 1930, and they should not be included in the railway valuation roll.

My Lords, with the exception of the Beckenham premises, the show cases and Smiths' bookstalls, this view applies in my opinion, also to all the other premises under consideration in these appeals. I can see no real ground for drawing any distinction in the case of any. Each of them is so let out as to be capable of separate assessment and, not being a " railway hereditament " should be omitted from the roll.

As regards the show cases, a separate point arises in regard to them, viz., whether the site which each occupies is land used for the exhibition of advertisements or for the erection of a structure used for the exhibition of advertisements but not otherwise occupied, within the meaning of the Advertising Stations (Rating) Act, 1889, s. 3. The point is of comparatively small importance ; but, in my opinion, the sites occupied by the show cases fall within the words of the section. It is true that they contain goods—but the goods in the show cases are not themselves offered for sale ; they are displayed for the purpose of advertising the goods which are offered for sale elsewhere. They fulfil the same advertising purpose as would be fulfilled by a printed description or a pictorial representation of the same goods. They seem to me to be advertisements and nothing else ; and the land occupied by a case which contains them, seems to me to be both land used for the exhibition of advertisements, and land used for the erection of a structure used for the exhibition of advertisements ; nor is it otherwise occupied. I would hold that the railway company was rateable in respect of the show cases, but only by reason of this special statutory provision.

As regards the premises at Beckenham I desire to add nothing to what is contained in the opinion of LORD WRIGHT, M.R., as being the grounds upon which they should be excluded from the roll.

There remains for consideration the question of Smiths' bookstalls. They require somewhat separate treatment because the question of their rateability under the general rating law was the subject of decision in

the Court of Appeal some 53 or 54 years ago. The present agreement under which W. H. Smith & Son Ltd. occupy the sites of their bookstalls is dated Sept. 11, 1929, but is in substantially the same form as the one in force when the case of *Smith v. Lambeth Assessment Committee* (7) was decided. It is in form a licence to erect and continue in the stations such bookstalls as may be necessary, the number, nature and position being subject to the general manager's approval who may order the removal of any bookstall to any other site within the station. Access by all, whether servants or customers, is subject to the railway company's byelaws. The bookstall employees, while on the railway premises, are to be under the control of the general manager and the stationmaster and in case of an employee misconducting himself at a station, he is to be removed by the licencees or, in default, by the railway company. The byelaws are to be observed; the bookstall servants are not to obstruct the railway's servants and are to conform to the railway company's reasonable orders; and no employee is to be retained, contrary to the decision of the general manager. Finally the railway company may exercise some control over what is sold at the bookstalls; the licensees agree not to offer for sale publications of a certain objectionable character. Here no doubt there is power to exercise some slight control over the occupants' user of the site, in that they bind themselves not to offer for sale any book, pamphlet or other publication of an indecent, immoral, indelicate, illegal or seditious character, or relating to medicines for complaints or ailments of an indecent or indelicate nature; a restrictive provision which might well find its place in the lease of business premises to a bookseller as to whose rateable occupation no shadow of doubt could exist. In my opinion the occupation by Smiths of the sites of their bookstalls is no different from the occupation of the site of the bank premises by the National Provincial Bank Ltd.: it is just as exclusive, just as paramount for rating purposes, just as permanent, and therefore just as rateable; and this notwithstanding the old decision of the Court of Appeal in *Smith v. Lambeth Assessment Committee* (7). That decision does not commend itself to my judgment. LINDLEY, L.J., in a subsequent case explained it as a case in which it was sought to rate the same thing twice over. However that may be, it appears to me to afford another instance of the old fallacious view that a demise was necessary and a mere licence was insufficient to create rateable occupation. Thus BAGGALLAY, L.J., having pointed out that no part of the station had been demised to Smiths said at p. 330:

It is clear to me that Smith & Son are not rateable, for the effect of the indenture was simply to grant a licence. . . . Where an exclusive occupation is conferred, the grantee becomes rateable; but, where merely a right to an exclusive enjoyment passes, the grantee takes no interest which renders him liable to be rated.

BRETT, L.J., states the question as being, was there a demise or a mere licence to sell and display, and he answers it thus :

there has been no demise, the indenture creates only a licence or privilege with certain auxiliary rights.

and therefore he holds that Smiths had no rateable occupation. LINDLEY, L.J., held there was no rateable occupation because there was no demise of any part of the station, but merely a grant of certain privileges, and no right to continue in occupation of any particular spot. It seems to me that the true question was not considered, viz., the nature of the *de facto* occupation by Smiths of the particular sites in respect of which they had been rated. The only question considered appears to have been whether Smiths had had sites demised to them, or whether they had a title to occupy the particular sites ; but rateability does not depend on title to occupy, but on the fact of occupation. In my opinion, the sites of the bookstalls in question on the present appeal are so let out as to be capable of separate assessment. They are not railway hereditaments nor do they form part of a railway hereditament.

For the reasons which I have endeavoured to indicate I would allow these appeals except as regards the show cases. I understand, however, that your Lordships think that the show cases do not come within the special statutory provision of the Act of 1889. Upon this footing I agree that the appeals should be wholly successful.

I think it right to point out that this result accords with what I think would have been the decision of MACKINNON, J., had he not felt himself bound to decide otherwise by reason of the decision in *Smith v. Lambeth Assessment Committee* (7).

LORD MACMILLAN [read by LORD MAUGHAM]: My Lords, I have had the privilege of studying in advance the opinion which my noble and learned friend LORD RUSSELL OF KILLOWEN has just delivered and also that which LORD WRIGHT, M.R., is about to deliver. They deal so exhaustively and to my mind so satisfactorily with the varied subject matter of these appeals that it only remains for me to express my agreement with them. Upon the one minor point on which my noble and learned friends are in disagreement, namely, as to the application of the Advertising Stations (Rating) Act, 1889, to the show cases in Victoria Station, I find myself on the side of LORD WRIGHT, M.R. The Act deals with

land used temporarily or permanently for the exhibition of advertisements or for the erection of any hoarding, frame, post, wall or structure used for the exhibition of advertisements.

I read the word " advertisements " here in its commonly accepted sense as referring to bills and posters, and while the goods contained in the

show cases are undoubtedly placed there for the purpose of advertising their merits, I do not think that the goods themselves are advertisements within the meaning of the Act. The land occupied by the show cases is accordingly not, in my opinion, used for the "exhibition of advertisements," although it may be said to be used for the purpose of advertising. The exhibition of actual goods for advertising purposes is a comparatively modern innovation, and at the period when the statute was passed, as appears from the law reports, the question in agitation was as to the rating of bill-posters' hoardings; it is reasonable to infer from this as well as from the language of the statute that it is to this type of advertising that the Act was intended to apply.

I desire to add only a few words as to the Scottish cases which have arisen under the Act of 1930. The problem arising with regard to the subjects to be included in or excluded from the railway valuation in Scotland is identical with that presented in England, for in sect. 22 (9) of the Act, which contains provisions as to the value of the Scottish portions of a railway undertaking carried on in England and in Scotland, it is enacted that, for the purposes of that section,

premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed not to form part of a railway company's undertaking.

The words I have quoted are an echo of the proviso to the definition of "railway hereditament" in sect. 1 (3) of the Act which has been so fully discussed in the present appeals. Their effect, as LORD HUNTER points out in *London and North Eastern Railway Co. v. Assessor for Glasgow* (8), at p. 183, is

to assimilate the position in England and Scotland so far as subjects which are to be deemed part of the undertaking for rating purposes are concerned.

Under the former law in Scotland, contained in the Lands Valuation (Scotland) Act, 1854, s. 20, the question in the numerous cases which arose was whether particular subjects formed part of the railway undertaking. It is not without interest to note that in *North British Railway Co. v. Greig* (9), it was held that station refreshment rooms let to a tenant were not part of the railway undertaking, while railway bookstalls were. Both LORD HUNTER and more emphatically LORD PITMAN in *David Allen and Sons Billposting, Ltd. v. Assessor for Clydebank* (10), at pp. 168 and 172, express the view that the formula defining "railway hereditament" in sect. 1 (3), and embodied in sect. 22 (9) provides a new statutory test which supersedes the necessity of referring to the authorities under the previous law. That is no doubt largely true, but the new statutory test itself contains words which require construction. It is necessary to determine whether the subjects are "let" or whether only a licence to use them has been given such as does not amount to

a letting; and it is necessary also to determine whether they are "capable of separate assessment," for it is plain from the Local Government Act, 1929, Sched. 11, para. 21, that a hereditament may be let out to a tenant "but not so as to be capable of separate assessment." On these points, as your Lordships have found, it may still be useful to seek light from some of the earlier cases.

My Lords, I do not propose to detain your Lordships by an examination of the Scottish cases under the Act. It is enough to say that I do not find anything in them which is inconsistent with the conclusions which your Lordships have reached in the present appeals, of which indeed I find an intelligent anticipation in LORD PITMAN'S statement (*David Allen and Sons Billposting, Ltd. v. Clydebank Assessor* (10), at p. 172) that

if a site for a shop is let out, whether it be a space on the platform of a railway company or otherwise within the premises it must be deemed not to be part of the undertaking.

This is the more fortunate in that in Scotland appeals from the decisions of the Assessor of Railways and Canals (now, I understand, called the Assessor of Public Undertakings) are heard by the Lands Valuation Appeal Court, which is a court of ultimate jurisdiction from which no appeal lies to this House, although, as LORD SANDS pointed out, the interpretation of a statute by your Lordships must be treated by that court as binding (*Assessor for Aberdeen v. Collie* (11), at p. 312). Hence the importance of the present decision as affecting Scotland as well as England.

LORD WRIGHT: My Lords, the questions in these appeals arise under the Railways (Valuation for Rating) Act, 1930, which I shall refer to as the Act. Under the Act the Railway Assessment Authority is required to prepare a railway valuation roll showing the net annual and rateable values of every railway hereditament in England. The question before the Assessment Authority and on appeal before the Railway and Canal Commission was whether the premises (to use a neutral term) here in question are, or are not, railway hereditaments, or, in other words, whether they should be excluded from, or included in, the railway valuation roll. The Assessment Authority included some and excluded others, but the Railway and Canal Commission on appeal have included them all as being railway hereditaments. The corporation of the City of Westminster, as the rating authority, now appeal to your Lordships and contend that the premises should all be excluded from the roll and separately rated.

The main purpose of the Act is to establish a single valuation of the railway undertaking as a whole, in place of the old practice of valuing each hereditament separately in the parish or rating area in which it

is situate: the undertaking having been valued as a whole in so far as carried on in England, that value is to be apportioned among the railway hereditaments in England occupied by that railway company (sect. 3): in order to prepare the roll it is necessary to determine what are and what are not railway hereditaments, according to the definition in sect. 1 (3) of the Act, which is as follows:—

“ Railway hereditament ” means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company: provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament.

“ Undertaking ” in relation to a railway company includes, in addition to the principal undertaking of the company: (a) any canal, dock or harbour undertaking carried on by the company; (b) any subsidiary or ancillary undertaking carried on by the company, not being a road-transport, sea-transport or air-transport undertaking; and (c) the share of the company in any joint undertaking carried on by, or on behalf of, two or more railway companies not being a road-transport, sea-transport or air-transport undertaking; but, save as aforesaid, does not include the share of the company in any joint undertaking.

Before seeking to ascertain the effect of this definition, it is necessary to state the character of the premises round which the dispute centres, which is sufficiently shown by the photographs produced; the nature of the businesses severally carried on in them or the use to which they are put: and the terms of the letting under which they are held. The premises which have been selected for examination in these proceedings are certain premises in Victoria Station and certain others in Beckenham Station; both these stations are the property of the respondents, the Southern Railway Company. I shall deal first with Victoria Station. The premises in Victoria Station are numbered V1 to V41: they are mostly shops of the lock-up variety, and in particular that type of shop generally known as a kiosk: there is also a branch of the National Provincial Bank, certain business offices on the first floor, Smiths' bookstalls, two hairdressing establishments and a few miscellaneous premises which are of small importance. All these premises can only be entered from the station, mostly from the open space within the station, called the concourse: they are all within the limits of the station, which is enclosed by its outer gates, all of which are closed by the railway company between 12.45 a.m. each night and 6 a.m. each morning, except for a short period at 4.30 a.m. In this way access to the station is shut off during these times, save by special permission of the railway company.

The bank, as appears from the photograph, is a two-storey building, with a door in the centre opening on to the bank. Among the shops is Boots' chemists shop, a well-stocked chemists' lock-up shop with a basement; the shop has been formed by taking a room on the first

floor of the station hotel premises, opening up the outer wall and replacing it by a double-fronted shop front: Sassoons is a long-fronted shop, with two doors, displaying for sale carpets and fancy goods; there are also flower and fruit shops with glass fronts and sides, and entrance doors, but only one of these is now in question as the railway company did not object to the other two being excluded from the roll, on the ground that, though the main entrances were from the station, there were also entrances from the roadway outside. There is an omnibus office, built of wood framework, with glass sides and entered by a door. The majority of the premises are kiosks, of greater or less size, for the sale of tobacco or confectionery; in these the customer is served outside, the shop attendant being inside: the type is too familiar to need further description. Another class of premises are what have been called show cases; these are of small dimensions, exhibiting articles dealt with by the companies whose names they bear: they are built or placed against walls of the station, except one, which is erected in a central space on the concourse; necessary attachments are made for lighting. There is also a small office, partitioned off from the booking office, let to the Travellers' Insurance Association, Ltd., for the insurance of baggage. Of the two hairdressing establishments, one is in the basement and consists of a large space partitioned off from the lavatories, the other is on the first floor, approached by a staircase. There are two office premises, one set occupied by the Pullman Car Co., Ltd., on the second floor, approached from the station by an outer door, of which the railway company have the key, and by a corridor, jointly used by the railway company, but the offices themselves are self-contained: much the same is true of the other set of offices, occupied by Bowman, Leadam & Grinling, Ltd. There are two other premises of trifling importance; one is an office let to the Postmaster-General as a waiting room for his staff: this is in the passenger gallery, which is approached from the platforms by stairways, the exit (closed at the same time as the other gates) being on the Ecclestone Bridge. There is also a small Nissen hut, of corrugated iron, to hold a small car, but dignified by the name of motor garage.

The bookstalls used by W. H. Smith & Son, Ltd., must be separately described. They are four in number and differ in size. They are constructed of timber, cut and shaped by the company's workmen at their workshops and fitted and put together on the sites which they occupy in the station. They are of the construction familiar to all, and are of considerable size: they occupy their sites by their own weight: they have all been used on their present sites for some years without being moved, though it is said in evidence that it is possible to move them by mechanical devices. They have pipes or cables fixed for lighting and so forth attached to the structure of the station.

All these premises are in fact possessed and used by the various persons to whom they are let by the railway company for the purposes of their several trades or businesses.

The premises at Beckenham Junction are all within the area enclosed by the railway company's station yard, the outer gates of which are closed between the hours of 8.30 p.m. and 6 a.m., and all day on Sundays : access to the station yard is thus controlled by the railway company, though they in practice give permission to the tenants, if they ask for it, to enter at times when the yard is closed. Certain of the premises, the subject of this appeal, consist of buildings of a permanent character, with stacking ground or storage bays attached ; the tenants are builders' merchants, who use the buildings as offices and showrooms ; certain other of the premises consist of a raised stacking ground, for builders' materials, with a concrete retaining wall, whereas others consist of open stacking grounds or bays for sand or other building material ; in all cases the spaces let are defined and delineated on plans.

I must next examine the various agreements under which the premises at Victoria Station are held. Some are in the form of a demise or tenancy agreement, others purport to grant a licence. But substantially their effect is the same so far as concerns what is material in this appeal, that is the question whether there is or is not *de facto* occupation. I shall first summarise (so far as seems relevant) the effect of the form adopted in the largest group, and then refer briefly to some differences to be found in the other agreements. I shall take as a sample of the most numerous class the agreement dated May 15, 1931, between Frederick Hotels, Ltd. (described as licensees) and the railway company : the licence is to occupy and use the site situate in the booking hall and the building erected thereon, with access over the company's adjoining premises at such time as the company's premises are ordinarily open for business purposes : reserving the right to the company to close their premises during the hours that they are not used for public traffic and a right to close temporarily for any special occasion : the licensees are to pay a yearly sum (free of all deductions except property tax) and a percentage of gross profits. The licensees are to pay all rates and taxes if the premises are separately assessed, and repay the same to the company if the premises are included in the company's assessment. There is the usual covenant to repair and yield up in good repair. The licensees are to permit the company to enter on the premises (a) to view their state and condition, (b) to inspect and repair the company's own adjoining premises. There are covenants against carrying on noisy or offensive trades or storing explosive or dangerous substances and so forth. The licensees agree to observe bye-laws and regulations made by the company with respect to the conduct and management of the company's premises, and the company are entitled to require the removal

from the company's premises of any employee whose conduct is objectionable. There is a clause for re-entry on non-payment of rent or insolvency: there is also a clause giving the company a lien on the licensees' goods and property upon the premises: and the licensees agree that they shall not have any claim for compensation for loss of goodwill (except under the Landlord and Tenant Act, 1927). This agreement is for one year and for any renewal period. Other agreements, not otherwise substantially different, are in the form of a demise, with a covenant against assigning or under-letting, and with covenants for quiet enjoyment. In certain of the agreements, the company reserve power to resume immediate possession of the premises if expedient for the alteration of the station or the railway lines. The agreement relating to the National Provincial Bank is for a lease for 21 years of the ground floor site, with access for the bank's customers during such times only as the bank is open for the conduct of public banking business. It contains the usual terms of a lease, with other terms similar to those set out above. Other agreements, also in the form of leases, carry the right of ingress to and egress from the premises from and to the station during such times only as the station is open for public traffic, and in some cases the right is reserved to the company to close the station temporarily during an emergency. The agreement relating to the Pullman Car Company's offices provide for the control by the railway company of the outer door or entrance to the building; the door is to be kept open during ordinary business hours and not to be opened for exit after such hours. It is in form a tenancy of the offices, with right of ingress and egress over the common staircase, but otherwise with the usual terms of a tenancy: the evidence was that each night the tenants' servant left the key of the offices with the railway company's attendant, who handed it next morning to the office cleaner: that course seems to have been adopted for the convenience of the tenants. The agreements for the show cases are in a different form. They are in form simply applications for permission to exhibit and maintain advertisements, subject to conditions which present no special features. The agreement in reference to the ladies' hairdressing saloon is in form a licence, but the licensee is to pay all rates and taxes (including landlord's property tax), and is to repair, clean and light the premises and keep them open during such hours as the railway company legally require: there is a provision for all rights of re-entry and otherwise of a landlord, and a provision against assigning the agreement without consent.

The only other agreement to which I need refer in detail is that of W. H. Smith & Son, Ltd., which presents special features. It is dated Sept. 11, 1929, nine months before the Act came into force, and is for a period of 21 years, subject to earlier determination in certain events. Like many of the other agreements, it contains a clause that it is to be

deemed to be a licence only and not a demise or lease of tenancy. The first clause gives a sole licence to sell books, etc., in the railway company's stations. Later clauses license the licensees to erect bookstalls on the platforms, the number, size, nature and position of which are to be subject to the approval of the general manager of the company, who has power to order the removal of any bookstall to another site in the station if he thinks it convenient to business or traffic. There is also the grant of all necessary ingress and egress for the licensees, their servants, customers and subscribers, subject to the company's bye-laws, rules and regulations at all proper and reasonable times. I must also refer as relevant to the extent of control exercised by the railway company, to the provisions (i) that the licensees' employees while at the stations or on the company's premises shall be under the control of the company and any employee misconducting himself shall be immediately removed from the stations and premises by the licensees, (ii) that the bookstalls shall be conducted in a regular and proper manner, (iii) that the licensees' employees shall observe the company's bye-laws and orders properly given by the company's servants for the purpose of enabling the company to carry on its business, (iv) that the licensees shall not offer or advertise for sale any indecent or otherwise objectionable book. There is a condition against assignment of the benefit of the agreement. The licensees undertake to repair the bookstalls. The company are to have a power of distress. The company are to be paid by a share of gross profits, with a guaranteed minimum sum. There is no reference to rates or taxes.

At Beckenham Junction, the agreements are in substantially identical terms. To take one instance, one of the agreements grants a licence to use the land and premises described in the schedule as a depot for storing builders' merchants' materials and for no other purpose; the land is described as in the goods yard, and is that coloured red on the annexed plan. The licence is terminable on three months' notice by either party. The licensees are to pay or bear rates and taxes (except landlords' property tax) in the event either of the premises being separately assessed or not, and there is a power of distress as if for rent in arrear and as if the licensees were tenants. Clause 3 calls for special notice: it is in these terms:—

The company their agents servants and licensees shall have free entrance and access to and over the said premises for all purposes and at all times.

There is a provision against the licensees assigning. The licensees must not use the premises except for goods which have been, or will be, conveyed over the company's system. They and their servants are not to be on the premises or in the goods yard when the yard is not open for business save with the consent of the stationmaster or goods agent. They are likewise to comply with any statute and all bye-laws, orders

and regulations affecting the user or occupation of the premises. They are to keep the premises and any buildings they erect in good and clean order and repair. The company are to have a lien on goods or other property of the licensees while on the premises. The company have power to determine the agreement in certain events, such as insolvency, and the licensees are to have no claim to compensation for goodwill. The agreement is merely to convey a right in the licensees to enter on the premises to exercise the licence, and is not to create any leasehold interest or tenancy.

On the facts and documents which I have outlined the Railway Assessment Authority included certain hereditaments in the roll and excluded others. The line of demarcation which they adopted at Victoria Station seems to have depended on whether a customer entered the shop or other premises or did his business from the outside. The bank and Boots' shop fell within the former category; most of the kiosks fell within the latter, but some kiosks were placed on the roll, on the ground that the counter was so recessed in the middle of the front of the kiosk that the customer stood within the general line of the front at each side of the counter. This criterion was not relied on by either side before your Lordships. On appeal, the Railway and Canal Commission held that all the hereditaments about which either side appealed, should be included. All three judges regarded the case as covered by the authority of *Smith v. Lambeth Assessment Committee* (7), but MAC KINNON, J., indicated that but for that authority he would have been inclined to answer in the other sense. SIR FRANCIS TAYLOR (with whom SIR FRANCIS DUNNELL agreed) was of opinion that the various tenants had only a subordinate occupation, the railway company being in paramount and exclusive occupation and therefore rateable, so that the premises of the tenants were not capable of separate assessment; he particularly relied on the fact that the railway company had sole control of the means of access to the station enclosure. This conclusion he applied also to the premises at Beckenham. He made a careful analysis of the authorities which he treated as binding him.

I shall now turn to the language of sect. 1 (3) of the Act. The essence of the definition is that the railway hereditament should not merely be occupied by the railway company but occupied for purposes of the railway undertaking: the scope of the term "railway undertaking" is explained to some extent by the exclusion of road transport, sea transport and air transport, and by the inclusion of any subsidiary or ancillary undertaking which the railway company carries on. It is clear, therefore, that the company may occupy hereditaments which are not railway hereditaments, because they are not occupied for purposes of the undertaking as, e.g., for road transport purposes. Now it is true that the Southern Railway Company occupies the Victoria Station as a whole

for purposes of the undertaking, but it must be ascertained whether the same can be predicated of the different premises in question in these proceedings. The company, under sect. 91 of the Act of 1924, has power (*inter alia*) to hold, sell, demise, let or otherwise dispose of the freehold or any other interest of or in any buildings erected on the site of any station or the right to build on any station. The company therefore has power to let out any or all of the premises in question in Victoria Station : before they let them out, or if they do not let them out, the premises, or at least the sites, are occupied by the railway company and, if occupied for purposes of the undertaking, form part of the railway hereditament. They seem, therefore, to be capable of coming within the proviso in sect. 1 (3), which, I think, contemplates that the company by an appropriate letting out should carve out of the railway hereditament as a whole, something which ceases to be a railway hereditament. So far I am referring merely to the site in the station ; when the premises have been erected on the various sites, each becomes a new and separate hereditament in respect of which the question has to be considered whether as such it is ever occupied by the railway company at all, or if occupied by the company, is occupied for purposes of the undertaking. The question relevant here is whether the premises were "so let out as to be capable of separate assessment." The converse phrase is to be found in the Local Government Act, 1929, Sched. 11, para 21,

any part of a freight transport hereditament let out by the company to a tenant but not so as to be capable of separate assessment. . . .

It is clear that something which otherwise would be a railway hereditament may cease to be such if it is so let out as to be capable of separate assessment ; these words require careful definition. They refer, I think, both to the character and the conditions of the letting and also to the purpose for which the premises are let : but there is also implicit a reference to rules of law which determine the position by their application to the actual circumstances. I think the rules of law which are implicit are not the rulings in any specific decided case or cases ; the circumstances of the particular letting in each of the cases now in question may not be precisely parallel to any existing authorities, and, further, an appellate court may not accept the pronouncements in the earlier cases as truly representing the law. The language of the proviso is quite general, and I cannot find any justification for saying that it gives legislative sanction to any particular decision. In one aspect, the problem is new. But I do not think that the words mean that an entirely fresh departure is to be made in the principles of rating law, though it becomes necessary for the court to attempt a survey of the whole of the existing authorities in order to arrive at a consistent and comprehensive appreciation of the relevant law.

The question then is whether the premises in question have been so

carved out of the railway hereditament, to which they or their sites belonged, as to be capable of a separate assessment, or whether they have, though let out, been so let out as still to leave them in the occupation of the railway company. I disregard for the moment the further question whether even if they remained in the occupation of the railway company, they were occupied for purposes of the undertaking, as defined in the section.

I shall consider first the premises in Victoria Station, that is the bank and the various shops, offices and other premises, but I shall reserve Smiths' bookstalls for separate consideration. All these premises would seem to be capable of separate occupation: Boots' chemist's shop or the bank, or any one of the kiosks constitutes a hereditament, which has been erected by the tenant, to use that term neutrally: when it is let out the occupation is in the tenant: he uses it for purposes of his trade; he possesses the key: when he shuts it after business hours, he still occupies it for his goods; there his position is so far identical with that of any shopkeeper who has a lock-up shop in an ordinary thoroughfare. What is, nevertheless, contended by the railway company is that whatever be the tenant's position, he has at most enjoyment, and not rateable occupation: the rateable occupier is all the time the railway company, who, it is said, occupy the shop or other premises, just as they occupied the site as a part of the station before the premises were erected. This contention seems at the outset to confuse the station itself with the premises erected upon it. But the essence of the argument is that for rating purposes occupation must be distinguished from enjoyment, or to put it differently, that, if the tenants possess or enjoy or occupy the various shops, their occupation is only subsidiary to that of the railway company, who are said to have paramount occupation, in the same way as the landlord of a lodging has paramount occupation of the whole house, including the rooms let to the lodger. The position of a lodger for rating law has long been well established, but the same principle has been extended to cases where premises included in a larger whole have been let out to other persons, subject to such limitations of user and such control, that these persons could not be regarded as having that sole and exclusive occupation which is the test of rateability in such cases. The premises were thus part of a larger hereditament "let out to a tenant but not so as to be capable of separate assessment."

In order to examine this contention it is necessary to refer to certain authorities. But some general propositions may first be stated. Two important principles have been clearly laid down by this House in *Holywell Union and Halkyn Parish v. Halkyn Drainage Board* (6). In that case LORD HERSCHELL, L.C., at p. 126, very precisely states the general distinction —

There are many cases where two persons may, without impropriety, be said to

occupy the same land, and the question has sometimes arisen which of them is rateable. Where a person already in possession has given to another possession of a part of his premises, if that possession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are, in a sense, in occupation, but the occupation of the landlord is paramount, that of the lodger subordinate.

But LORD HERSCHELL, L.C., in the same case further points out that the relation of tenant to the owner of the property is not necessary to constitute rateable occupation. He says at p. 121 :

Land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying liable to be rated.

Later he says, at p. 125 :

The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title.

The case of *Cory v. Bristow* (5) is also instructive in regard to certain general principles. The rateable subject matter there consisted of permanent moorings fixed by Messrs. Cory on the bed of the Thames under the right granted them by the Thames Conservators in virtue of their parliamentary powers, to occupy them by their hulk or derrick. The decision is important as showing that a person no less occupies in the rating sense because he does so subject to regulations or bye-laws or is liable to be turned out on short notice : thus LORD HATHERLEY, at p. 276, says :

But in the present case all the argument has turned upon this, that independently of the question whether or not this be a licence or in the nature of a demise, inasmuch as there are certain bye-laws which may be made from time to time by the Conservators, who have given this permission, and inasmuch as by the 91st section of the Act the power of any person to have this beneficial occupation may be determined on a week's notice, therefore, there is not conferred on the Messrs. Cory the exclusive possession of these mooring-chains which they have been permitted to place in the river as is described in the case. I apprehend, my Lords, that it would be a confusion of ideas to say that it interferes with the exclusive possession any more than a right of re-entry on the part of a landlord in certain given events could be said to interfere in any way with the right of the tenant during the time he is holding. He is in beneficial occupation for a term, though that term is limited by certain contingencies which may possibly determine his interest at an earlier period.

And further, LORD CAIRNS, at p. 274, also refers to the fact that Messrs. Cory were to work to the satisfaction of the conservators under the inspection of the harbour master : he points out that Messrs. Cory were none the less in rateable occupation because they were required to obey the conservators' bye-laws, and were to work to the satisfaction of the conservators and subject to definite limitations, and were liable to be ejected on notice.

It is also clear that a person may occupy part of a larger building, though he can only obtain access by permission of the general owner, if I may so call him. Thus in *Halkyn's* case (6), LORD HERSCHELL, L.C., expressly recognised this principle when he cited, at p. 125, the case of *Lancashire Telephone Co. v. Overseers of Manchester* (12), in which a telephone company were held liable to be rated in respect of their wires and poles where the wires were attached to the roofs or walls of houses by the permission of the occupier, who, nevertheless, retained complete control of the building, so that the company could only obtain access to the roof by his permission. LINDLEY, L.J., said :

The distinction between an easement of support and the occupation of that which affords support is often very fine. I think the telephone company occupy land in the same sense as many other persons who have been grantees of easements, and have been held rateable.

These statements of general principle are very relevant in considering the main features relied on as negating rateable occupation by the tenants in the present cases. The railway company, it is said, have reserved such control that their occupation is paramount, and indeed they were bound to do so in order to fulfil their statutory duty of working the railway : thus they control the access or egress to and from the shops by closing the station gates all night, they require the tenant to obey their bye-laws and regulations, and they impose the various restrictions contained in the agreements which I have quoted above. But in my opinion, these matters are on the authorities I have cited and in principle not inconsistent with the fact of rateable occupation being in the tenants : any tenant may be subject to restrictive covenants of a stringent character, such as limitations against using the premises for noxious or unlawful purposes, or covenants requiring obedience to regulations, or restrictions on modes of access, or as to the mode of conducting the business ; obvious examples are the covenants in the case of a tied house, or restrictive covenants as to the businesses permitted. These restrictions do not in themselves save the tenant from being rateable, if he is an occupier in other respects. I cannot find in the agreements in question any reason to hold that the tenants are not rateable. The railway company have no doubt quite properly imposed such restrictions as seemed necessary for the proper working of the station as a whole. They have reserved the right to close the station each night, and also a special right to close temporarily in cases of emergency : but these are merely restrictions on the tenants' user and enjoyment, and do not change their character or make the occupation other than a sole and exclusive occupation. The tenant is still in sole occupation of his premises, and has full use of them to carry on his business. As one indication of this I may refer to the terms of the agreements which give the railway company limited rights of entering for specific purposes,

e.g., to view the state of repair, and so forth. These terms indicate a possession in the tenant adverse to the landlord. On this point I may refer again to LORD HERSCHELL, L.C., in *Halkyn's* case (6), at p. 123, where he says :—

If the company were to have an easement only, and were not to be in possession of the tunnels and works which they constructed, and the Duke was to remain in possession of them, it is difficult to understand why a covenant should be taken to “permit and suffer the Duke to go down dial and measure the tunnels and shafts.”

As to the closing of the station at night, this is done outside business hours and as MACKINNON, J., shrewdly observes, is rather an advantage to the tenants, because it tends to obviate the risk of burglary to which lock-up shops in public thoroughfares are peculiarly exposed. It is obvious that the tenants' occupation is continuous, because at night he occupies by his goods. The tenant is the person entitled to exclude trespassers, e.g., from the bank or Boots' shop, or to bring ejectment.

A great many authorities have been cited in support of the argument that the tenants' possession of the premises under review is only subordinate and, as it was said, analogous to that of a lodger. It is true that the lodger has never been held rateable : that was decided as long ago as 1784. I do not intend to examine the cases in detail, especially as the position of the lodger is authoritatively explained by LORD HATHERLEY in *Cory v. Bristow* (5), at p. 276 :

although a lodger [may have] the exclusive use of the chambers he occupies, still there is a concurrent right reserved by . . . the person who lets the lodgings, of using the lodging-house for whatever purposes he may think fit for managing the establishment and all purposes connected with it.

In other words the landlord occupies his premises and uses them for his business of keeping lodgers. Such a case is far removed from the case of the tenants here, who occupy their shops in order to carry on their business. *Smith v. St. Michael, Cambridge, Overseers* (13), was merely an application of the lodger principle to a case where the landlord, who occupied a house and lived in part of it, let certain rooms to Inland Revenue officials, who used them for their business, but the landlord was held to have had his own servants to look after the house and furniture, and to have retained the occupation, though he had agreed to give the exclusive enjoyment of the occupation to the lodger. Such was the explanation of *Smith v. St. Michael, Cambridge, Overseers* (13), given by BLACKBURN, J., who was a party to that decision, in *Allan v. Liverpool* (1), at p. 192.

I must, however, refer to two cases much stressed in argument on behalf of the railway company. One is *North Western Railway Co. v. Buckmaster* (4). The premises in that case consisted of “a stable for the accommodation of four horses” at the Clapham station, situate

within the fence of the company's premises, thought it appears that the gates were not closed. In the Queen's Bench, BLACKBURN, QUAIN, and ARCHIBALD, JJ. (QUAIN, J., with great hesitation) held that the agreement should be construed as a licence and not a demise of the premises for the time being: QUAIN, J., was of opinion that all that the agreement involved was the providing of stable accommodation for four horses: BLACKBURN, J., thought that the stable might be held to remain part of the station premises and under the control of the company, so that the railway company were the proper occupiers: emphasis was placed by him on the provision that the tenants were to be subject to the company's bye-laws. In the Exchequer Chamber, the judges were equally divided, and the decision of the Court of Queen's Bench stood. AMPHLETT, B. (delivering the judgment of himself, LORD COLERIDGE, C.J., and POLLOCK, B.) agreed with the Court of Queen's Bench: they thought it highly improbable that the railway company had intended to grant a demise with no provision against alienation, and no power of re-entry: they also thought that all that was given was accommodation for four horses in some stable. I understand these judgments as based on the view taken by the judges of the particular agreement in the light of the particular circumstances. CLEASBY, B., delivered the judgment of himself and GROVE and DENMAN, JJ. to the opposite effect. I find their reasoning more convincing: they held that the effect of the agreement was to hand over to the tenant the possession and occupation of the stable, the stable being regarded as a separate tenement: there was rent payable: property tax was to be deducted: possession was to be given up at a month's notice: the terms as to bye-laws, they held, did not give the railway company a right to interfere with the occupation and possession of the stable: in brief, they held that on the agreement as a whole, an independent possession was given to the tenant, who was accordingly rateable. Having carefully considered this case, I am of opinion that the judgment delivered by CLEASBY, B., was correct. But in any case I think the other judgments proceed on a view that the effect of the agreement was to reserve control over the stable, if a stable was in question, combined with a view that not a stable but a stabling, was the subject of agreement. Though the case has been cited with approval, it is in my view most unsatisfactory as an authority, and, as I have said, I think it was wrongly decided. As appears below, it has not passed without question.

Rochdale Canal Company v. Brewster (2) was a case which was similar to and followed *Allan v. Liverpool* (1). It had reference to a berth at one of the Liverpool Docks. The berth was under the agreement set apart and appropriated to the use of the plaintiffs, at a rent free from deductions save landlord's property tax, and the plaintiffs, to pay all rates and taxes: the plaintiffs were to keep the premises in repair:

they were to allow the servants and officers of the Dock Board free access to all parts of the premises and to conform to bye-laws: the quay space was not fenced in from the street: the Dock Board reserved a right of re-entry in certain events. The Court of Appeal held that the plaintiffs were not rateable: LINDLEY, L.J., thought the agreement pointed to a letting of land and not merely to the creation and enjoyment of a mere easement or licence to use. But he held on the authority of *Allan v. Liverpool* (1) and *North Western Railway v. Buckmaster* (4) that there was an occupation of land which was at all times subject to the control of the owner which was not such an occupation as to render the occupier liable: the occupation was held to be analogous to that of a lodger.

This case, with *Buckmaster's* case (4) and certain earlier cases were much relied upon by SIR FRANCIS TAYLOR in his careful judgment in the Railway and Canal Commission: but in my opinion it, like so many of the earlier cases, can only be justified, if at all, as based upon the special view taken by the court of the particular circumstances of the case. As LORD HERSCHELL, L.C., said, rateable occupation is a question of fact by which is meant that it must be ascertained by considering all the circumstances of the case. It may be that in *Brewster's* case (2) the circumstances were such (perhaps because of the peculiar position of the Dock Board and its special duties) as to involve a constant and general control over the berth in question so as to prevent the tenant being rated separately. If that is so, the position is different from the position, as I understand it, of the premises in question in *Victoria Station*. Indeed, *Brewster's* case (2) was distinguished in a case which appeared to present many similar features: that was *Young & Co. v. Liverpool Assessment Committee* (3), where there was a lease of a vault and quay space in a Liverpool Dock for purposes of a bonded warehouse. The premises were wholly within the dock walls and access could only be obtained by passing through gates in the absolute control of the board: the lessees had the keys of the premises: they had to leave for the use of the Dock Board free access to certain machinery belonging to the board in the docks: the lessees were to be subject to the byelaws and to certain restrictions: they agreed that the user of the premises should be so worked by the company as not to cause interference with the general working of the dock and that the servants of the board should at all reasonable times have free access for the purpose of such general working. A Divisional Court (LORD ALVERSTONE, L.C.J., HAMILTON and AVORY, JJ.) held that the lessees were in rateable occupation. HAMILTON, J., relied in part on the use of the word demise, though he pointed out that the use of a term of art cannot alter the truth; he held that the various covenants on the part of the lessee, though some were special, did not turn the position into that of a mere licence: indeed he thought the

covenants giving the lessors control as to particular matters pointed to there being no general right of control reserved in the lessor. The court clearly attached no special importance to the fact that access to the premises was by gates controlled by the lessors. In *Brewster's* case (2) there was no such control of access. This in itself supports what I think is otherwise clear, that control of access by a landlord is not decisive against a tenant being in rateable occupation. As I understand the circumstances of *Young's* case (3), I think it was decided on right principles. But *Smith v. Lambeth Assessment Committee* (7) was in my opinion wrongly decided, and was based on an erroneous view of the relevant circumstances and of the law. I must consider that case separately when I deal, as I now do, with the bookstalls.

On the description of the facts and the agreement in reference to Smiths' bookstalls which I have given earlier in this opinion, I think that on principle they are so let out as to be capable of separate assessment and ought to be excluded from the roll as not being railway hereditaments. They are premises of considerable size, occupying definite areas which they have occupied for a long time without being moved. It is true that the railway company reserve power to change the sites, but the evidence is that they do not ever, or only at very rare intervals, exercise that power: while the stalls remain in a particular site, the site is occupied by Smiths. In *Electric Telegraph Co. v. Salford Overseers* (14), where the subject of assessment consisted of telegraph posts of which the landowners could direct removal at will, it was held that there was exclusive occupation of the soil by the posts so long as they were not required to be moved. There was sufficient permanence to constitute rateability. That principle applies in my opinion to the bookstalls. They and the sites on which they stand are in fact beneficially occupied, like any of the other shops or premises in the station: it would be unfair that they should escape being rated while the other premises are. But it is said that the terms of the agreement are such as to involve nothing more than a mere permissive licence, because a pervading control is exercised at all times over Smiths and their servants. I cannot accept this view. I have referred to *Cory v. Bristow* (5), in which this House held that obedience to bye-laws and subjection to control in the conduct of the business carried on, were not inconsistent with occupation. Regulation of right of access is not here material. The various terms undertaken by Smiths such as their agreement not to interfere with the business or traffic of the railway company and not to sell or exhibit publications which are detrimental to the company's interests, are only of the same character as the restrictive covenants which have so often been referred to already in this opinion. There is a covenant to repair the bookstalls; the railway company are given power of distress; though there is the usual clause that the agreement is to operate as a licence only and not

as a demise or lease or tenancy, such a clause cannot change the true nature of the agreement. In any event, the question is whether there is *de facto* occupation; I think there is though in terms only a licence and liberty are given. I cannot regard the bookstalls as other than independent hereditaments, capable of independent occupation, and in fact occupied by Smiths and no one else; I cannot see how the railway company can be said to be in occupation of the bookstalls, or how they can be regarded as bearing to Smiths the same relation as a landlord bears to his lodger. Such a view seems to me to involve a confusion between the station area which is not let and the specific hereditament which is let. Nor can the question be decided by considering that before the railway company let the bookstall site they were in complete occupation of the whole area including that site, and remain in occupation still of the surrounding area: the theory of the lodger does not depend on the fact that the landlord still lives in the house, but on the fact that he still retains control for purposes of his business of the whole house: here, I think, the railway company does not retain such control *quoad* the bookstalls, but lets out the bookstalls to Smiths for purposes of their separate business.

But this opinion is contrary to the decision of the Court of Appeal in *Smith v. Lambeth Assessment Committee* (7) given in 1882, by a court composed of BAGGALLAY, BRETT and LINDLEY, L.JJ. The judgment of BRETT, L.J., at pp. 330, 331, is quite short, and may be quoted in full:

In this case the question is whether the indenture dated April 25, 1872, amounts to a demise of part of Waterloo Station or is merely a licence to sell books and newspapers with leave to display and keep the same on different parts of the station. Parts of the indenture look like a demise, others are wholly inconsistent with an intention to create an interest of that kind. In order to ascertain the true meaning the whole instrument must be looked at; parts of it must not be taken separately, the question arises upon the whole. The grantees are called the "tenants"; but they can go into the station only at reasonable, that is particular, times and for limited purposes; the rent is to be paid for the whole of the licence or privilege granted; the bookstalls and cupboards have been erected with the approval of the company's engineer and are moveable at pleasure, for it is for the company to direct where they are to be placed. It is clear upon these facts that there has been no demise, the indenture creates only a license or privilege with certain auxiliary rights. In this view Smith & Son have no rateable occupation; the only manner in which the bookstalls can be rated is that the railway company must be assessed at an enhanced value. It is not necessary to refer at length to the cases which have been cited. I need only say that I reserve until a proper occasion my opinion whether *London and North Western Rly. Co. v. Buckmaster* (4) was correctly decided.

The other judgments are in substance the same. It is obvious that what is considered here by the court is merely the language of the agreement; yet it is clearly established, as I need not repeat, that what is material

is not necessarily the terms of the grant, but the *de facto* occupation which may be greater or less than the terms convey. The question is not concluded by saying it is an easement, not a demise. The limitations which BRETT, L.J., treats as decisive are merely restrictive covenants. The fact that a single rent is paid both for the occupation and use of the bookstalls and for the sole and general privilege of selling books and so forth in the station cannot affect the nature of the use and occupation. LINDLEY, L.J., distinguishes *Cory v. Bristow* (5) simply by saying that in that case there was, and in the case before him there was not exclusive occupation; that is merely to state, not to justify, the distinction.

This case cannot be regarded as an authority which can help in the decision of other cases where the circumstances differ, and on that ground I have disregarded it while dealing with the other premises at Victoria Station. But for reasons which I have sufficiently explained, I think it was wrongly decided and is inconsistent with the authorities both before and since its date. It has since been followed twice in Scotland and once in Ireland in cases relating to bookstalls, but I do not find that it has been relied on as embodying any principle. It was explained by LINDLEY, L.J., in the *Lancashire Telephone* case (12) in 1884 in a passage which at first sight is puzzling, he says :

I do not feel pressed, I confess, with the case of *Smith v. Lambeth Assessment Committee* (7), because there it was attempted to rate two people for the same things. There the railway company were rated for the land for which it was also sought to rate Smith, but here nobody is rated for this occupation. I cannot find any distinction in principle between the present case and *Electric Telegraph Company v. Salford Overseers* (14) and *Cory v. Bristow* (5).

The two cases which LINDLEY, L.J., cites would seem to lead to the conclusion exactly opposite to that which was reached in *Smith's* case (7) : but it seems that an attempt was in fact being made to rate two persons for the same premises, because the railway company were already paying rates on the bookstalls, their value being included in the general rate for the station charged upon the company. This may explain why the court decided as it did, but is not in logic a sufficient ground for the decision. Nor can it apply now when the question is whether the bookstalls are railway hereditaments ; if they are not, Smith will be rated, but the railway company will not.

It has been strenuously argued that the authority of *Smith v. Lambeth Assessment Committee* (7) has stood so long that it should not now be overruled, and reliance has been placed on expressions of opinion in this House in certain cases that a decision of old standing should not be departed from. But there is no rule which debars your Lordships from doing justice even at the cost of reversing an old authority, that is an authority of a court inferior to this House. It is true that in *London*

County Council v. Erith Parish (15), at p. 599, LORD HERSCHELL, L.C., said that he deemed

it expedient to interfere in such a matter as this with a long course of practice supported by decisions which are not of very recent date. Therefore, even if it be not possible to rest upon grounds altogether satisfactory the exemption of these sewers, yet the case being, as I have said, a very particular one, I could not advise your Lordships to depart from a practice which has prevailed for a very long period, and which has been sanctioned by judicial authority.

He was dealing with the rating of sewers, but in *West Kent Main Sewerage Board v. Dartford Union Assessment Committee* (16) this House did depart from the old rule in regard to the rateability of underground sewers. LORD ATKINSON put the question (at p. 177)

whether this House ought still to be deterred, despite the difficulties which have arisen in rating operations, from sweeping away this anomalous exemption, and putting the law in respect to the rating of sewers on the sound and rational basis upon which the law has by recent authorities been put in respect of other rateable subjects of property, simply because it might place unforeseen burdens on sewer authorities, or render more onerous the engagements into which they have heretofore entered in the belief that the anomaly would continue.

The question and the answer are peculiarly pertinent in this case. He answered it in the negative. In *West Ham Union v. Edmonton Union* (17), LORD LOREBURN, L.C., admirably stated the general principle at p. 4 :

Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them.

There are many reasons why, if *Smith v. Lambeth Assessment Committee* (7) was, as I think, wrongly decided, this House should in the present case not give effect to that judgment. I have referred to the peculiar circumstances which may have influenced that decision, that is, to the attempt to rate twice over. Nothing of the sort applies now. What we are concerned with is a new statutory duty imposed on a new statutory body, the Railway Assessment Authority ; its duty is to distinguish railway hereditaments from others, according to the test whether the others are so let out as to be capable of separate assessment. The Act has not stereotyped any particular decision. It would be unjust, and therefore impossible in my opinion, to apply one principle to Smiths' bookstalls and a different principle to all the other non-railway hereditaments. The Assessment Authority must act on uniform principles in preparing the roll, unless there is some absolute law to the contrary. I think there is not. Smiths cannot claim a sort of privilegium. It is

said that it is hard for them to have to pay rates when they entered into a contract for 21 years on the basis of an exemption which they had enjoyed since 1882 or earlier. But when they made that contract in Sept., 1929, nine months before the Act was passed, it was clearly known that railway rating was to be put on a new basis. The Act commonly known as the Derating Act had shown that transport undertakings were on a different footing from retail shops, the former enjoying, while the latter did not enjoy, special privileges. The position was completely different from that in 1882, and indeed, at that date, there was no special reason why the Rating Authority should seek to get rid of the decision : they got their rates from the railway, if they did not get them from Smiths, and they could not get them twice over. In all the circumstances of the case I think this House is entitled, and indeed bound, to refuse to affirm the peculiar anomaly which would exist if Smiths' bookstalls were treated differently from the other shops and offices at Victoria.

I have still to mention the show cases about which a special question arises, by reason of the Advertising Stations (Rating Act), 1889. This Act by sect. 3 provides that where land is temporarily or permanently used for the exhibition of advertisements, or for the erection of any hoarding, post, wall or structure used for the exhibition of advertisements, but not otherwise occupied, the owner shall be deemed to be in beneficial occupation of the land and shall be rateable on it. I think that these show cases are occupied by their owners, by means of the goods which they exhibit : so far I see no distinction in principle from the other premises which I have discussed. But the question remains whether they fall within the last-mentioned Act. I do not think they do. The Act, I think, is dealing with what in ordinary parlance would be called advertisements, such as posters, hoardings, and so forth. What are exhibited in the show cases are goods, not advertisements. It is true that the goods are not exhibited for purposes of being sold, at least on the spot, though no doubt they might be purchased by arrangement made at the shop. The show cases in truth might fairly be regarded as shop windows, though placed at a distance from the actual shop. I do not think they fall within the Act of 1889. As, in my judgment, the railway company are not in occupation of the premises in question, it is not necessary to determine whether, if they had been in occupation, the premises could have been properly held to be railway hereditaments within the Act.

I have still to deal with the premises at Beckenham Junction. I have described what they are and referred to the relevant agreements. They are specific and delineated sites and capable of separate occupation just as much as the shops at Victoria. The limitation of access is in principle the same. The restrictions on the rights of user, in particular, the condition that they are not to be used for the storage of goods other

than goods which have been conveyed or are about to be conveyed by the company's railway, are not different in principle from the various restrictive covenants which I have discussed. The agreements are in the main similar in form to those which have been summarised in connection with Victoria Station. They expressly contemplate the possibility of the premises being separately assessed, or of being included in the general assessment of the railway. I should not have thought that the agreements were in a form which called for any separate discussion after what I have said of the agreements relating to Victoria Station, were it not for clause 3, which I have quoted above. If that clause could be read literally at its face value and without qualification, I should be of opinion that it was not consistent with the tenant having an independent occupation, that is, if it were construed as entitling the company by its servants to go in and upon the premises at all times for all purposes. These latter words read literally would give the company power to fill the premises with the company's goods and would negative exclusive occupation on the part of the tenants. But so read, the clause would be inconsistent with the whole tenor of the agreement. The agreement must be read as a whole, and clause 3 must be construed so as not altogether to destroy the grant. I think the rights which the clause gives are not wider than those to be found in the clause I have quoted from *Young & Co. v. Liverpool Assessment Committee* (3). Apart from clause 3 I construe the agreement as giving an independent occupation, and I construe clause 3 as giving right of access not inconsistent with exclusive occupation as that term is understood in rating law.

I think the appeals should succeed.

Appeals allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellants); *Torr & Co.* (for the respondents, the Railway Assessment Authority); *W. Bishop* (for the respondents, the Southern Railway Company); *Bircham & Co.* (for the respondents, *W. H. Smith & Son, Ltd.*).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

STOTT *v.* GREEN.
STOTT *v.* HENSHAW.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Paroq, JJ.), **May 19, 1936.**]

Sale of Goods—False trade description—Lysol Soap—Fixing a standard for a commodity—Merchandise Marks Act, 1887 (c. 28), s. 2.

Upon a prosecution for selling a soap described as "Lysol Soap" but which contained only a minute quantity of lysol, the defendants, were discharged, the magistrate being of the opinion that he had no power in a prosecution under the Merchandise Marks Act, 1887, to fix a standard:—

HELD: the magistrate had power to fix a standard upon the evidence and was bound to do so.

[EDITORIAL NOTE.] It has been held that in a prosecution under the Food and Drugs Acts, where there is no statutory standard of purity, the court must fix the standard on the evidence before it. The point determined here is that the same principle is applicable in a prosecution under the Merchandise Marks Act for selling goods of a false trade description—in the present case a sale of "lysol" soap that only contained an infinitesimal trace of lysol.

AS TO STANDARD OF PURITY, see HALSBURY, Hailsham Edn., Vol. 15, p. 155, para. 248; and FOR CASES, see DIGEST, Vol. 25, p. 88, No. 150 and Supp.]

APPEAL by way of case stated by the stipendiary magistrate of Salford.

G. manufactured and sold to H., a retailer, a soap described as "Medicated Lysol Soap." S., an officer appointed by the Salford Corporation under the Merchandise Marks Act, 1887, laid informations against G. and H. under sect. 2 (1) of that Act, and they were charged with selling the soap under a false trade description. The City analyst, in evidence, stated that the soap, to be described as "Lysol Soap," must contain not less than 2 per cent. lysol, but the soap in question contained only 0.1 per cent. lysol. The defendants contended that the soap was honestly compounded and did in fact contain lysol, even though a minute quantity. It was, therefore, properly described as "Lysol Soap."

The magistrate held that he had no power, analagous to the power under the Food and Drugs Acts, to fix a standard, but that if he had such power, he would have fixed the standard at 1 per cent. lysol.

W. Gorman, K.C., and P. Butlin for the appellant.

R. M. Montgomery, K.C., and H. J. Phillimore for the respondent, Green.

W. Gorman, K.C.: A false trade description had been used. On the finding of the magistrate, if there had been but two drops of lysol in a vat he would not have convicted. To be described truly as "Lysol Soap," there must be an amount of lysol sufficient to be efficacious. The magistrate has a power to fix a standard and he should have fixed a standard.

Montgomery, K.C.: The magistrate found there was no recognised standard and he is not empowered therefore to fix a standard.

LORD HEWART, L.C.J.: The appeal must be allowed. The stipendiary magistrate was wrong in holding that so long as there was any lysol or creosol in the soap he was unable to convict. In my opinion the offence was made out and the case must go back to the magistrate with the direction in each case to find that the offence charged has been proved.

HUMPHREYS, J.: I agree.

DU PARCQ, J.: I agree.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. Hooper Tomson*, Town Clerk, Salford (for the appellant); *Wingfields, Halse & Trustram*, agents for *J. A. K. Ferns*, Stockport (for the respondent, Green).

[Reported by H. P. LANSDALE-RUTHVEN, ESQ., Barrister-at-Law.]

STROOD ESTATES CO., LTD. v. GREGORY.

[COURT OF APPEAL (Sir Boyd Merriman, P., Scott, L.J., and Eve, J.),
April 29, 30; May 1, 21, 1936.]

Landlord and Tenant—Restriction on increase of rent—Rates—Compounding by landlord—Calculation of net rent—Increase of rent—Improvements or structural alterations—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), ss. 2 (1), 12 (1) (c)—Housing Act, 1925 (c. 14), s. 1.

A landlord of controlled premises paid the rates and received a compounding allowance from the local authority. In calculating the net rent he claimed to deduct from the standard rent only the amount of the rates he actually paid and not that assessed. He also claimed to increase the rent on the ground that he had carried out replacements of sanitary conveniences and similar work, and, that these were "improvements or structural alterations":—

HELD: (i) the landlord must deduct from the standard rent the amount of rates chargeable, and not merely the amount payable, in order to arrive at the net rent.

(ii) the sanitary work was an improvement or structural alteration for which the landlord was entitled to increase the rent under the Increase of Rent and Mortgage (Restrictions Act), 1920, s. 2 (1) (a).

Leave to appeal to the House of Lords granted upon special terms.

[EDITORIAL NOTE. The main point dealt with in this appeal is whether a landlord who pays the rates, whether by agreement or by reason of statutory enactment, and who in consequence receives a "compounding allowance," is entitled to deduct the full amount of the rates or only the amount paid in arriving at the net rent. It was held that he must deduct the full amount chargeable and not the smaller amount paid. The result is to reduce the increases the landlord may make since they are calculated as percentages on the net rent. The other point as to whether the provision of modern sanitary conveniences is an improvement under the 1920 Act, s. 2 (1) (a) has been the subject of controversy for many years, and it is helpful to have the views of the Court of Appeal thereon.

FOR INCREASES UNDER THE RENT ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 323-325, paras. 383-386, and for CASES see DIGEST, Vol. 31, pp. 567, 568, Nos. 7139-7150.]

Cases referred to :

- (1) *Evans v. Baxter* (1930), 46 T.L.R. 270 ; Digest Supp.
- (2) *Nicholson v. Jackson* (1921), 37 T.L.R. 887 ; 31 Digest 567, 7149.
- (3) *Hodgkinson v. Hewitt* (1928), 44 T.L.R. 694 ; Digest Supp.
- (4) *Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K.B. 685 ; 31 Digest 576, 725 4
- (5) *Morgan v. Liverpool Corpn.*, [1927] 2 K.B. 131 ; Digest Supp.
- (6) *Butcher v. Broadhurst* (1931), Estates Gazette Digest 301.
- (7) *Nightingale v. Loverock*, [1934] L.J.N.C.C.R. 349.
- (8) *Free v. Callender's Trustees* (1927), S.L.T. (Sheriff's Ct. Rep.) 17.

APPEAL by the defendants from a judgment of His Honour JUDGE CLEMENTS given in Rochester County Court on Feb. 12, 1936, awarding the plaintiff company £3 2s. 11d. arrears of rent.

The plaintiff company, respondents to the appeal, were landlords of controlled premises ; they claimed £3 2s. 11d. arrears of rent for a cottage and garden in Strood, alleging that the weekly rent was 8s. 6d. and that these arrears had accrued between Sept. 16, 1935, and Jan. 20, 1936. The defendant tenant said that he was ready and willing to pay 7s. 1d. per week ; that his tender of this sum had been refused ; that he was entitled to set off 1s. 5d. per week overpaid for six months, and that he brought the balance of 7s. 8d. into court. The exact figures were intricate and not material to the point of law involved. There were three heads of dispute : (i) whether the standard rent was 5s. 6d. or 5s. 3d. per week ; (ii) whether in calculating the net rent the landlords must deduct the whole of the rates assessed or only the compounding rent they paid ; and (iii) whether the landlords were entitled to increase the rent in respect of certain sanitary improvements which they had carried out in 1932 : installation of a water-closet with necessary drains and connections, a sink, and a concrete pavement. The learned judge found that the standard rent was 5s. 6d. ; that the landlords were entitled to deduct the compounded rate ; and that the work done had been by way of structural alteration or improvement under the Rent Act, 1920, s. 2 (1) (a). The tenant appealed. On the appeal, point (i) was not pressed and the argument was mainly concerned with point (ii). This point affected a large number of controlled properties. The landlords were responsible for paying the rates. Under the Act of 1920 the net rent is ascertained by deducting the rates from the standard rent, and recoverable increases are calculated as percentages of the net rent. It is therefore in the landlords' interest to deduct as little as possible, so that his percentage increases may be larger. Here, the tenant claimed that the landlords must deduct the full amount of the rates—the rates chargeable. The landlords contended that they need only deduct the rates less their compounding allowance—the rates payable.

The dispute on point (iii) merely turned on whether the landlords could increase the rent in respect of work which they were bound to do in any event to keep the premises reasonably fit for human habitation.

Thomas Southall, for the appellant tenant.

Donald McIntyre, for the respondent company.

Southall : The words of sect. 12 (1) (c) must mean that all Acts by which the burden of rates is transferred from the occupier to the owner are to be disregarded ; therefore the sum to be deducted is that which would ordinarily have to be met by the occupier. This, ever since 42 Eliz., has been the full amount of the rates. When the 1920 Act was passed, there existed no statutory provision whereby any occupier was relieved from any part of the burden. The plain meaning of the Act is that the whole amount of the rates chargeable must be deducted.

[Counsel referred to the "compounding Acts"—Poor Rate Assessment and Collection Act, 1869, ss. 1, 3, 4 and 12 ; Rating and Valuation Act, 1925, s. 11.] The amount at which the owner is rated is the full sum—i.e., the rate chargeable. The principle is illustrated in *Nicholson v. Jackson* (2) and *Evans v. Baxter* (1). When the landlord collects the rates and receives a compounding allowance, both he and the local authority benefit. The tenant takes no part in the matter. If the learned judge's decision is right, then the landlord makes two profits : his allowance, and the increased percentage which he charges the tenant as a result of not deducting the allowance from the standard rent. This second profit is paid by the tenant. This could not have been the intention of Parliament when passing an Act intended to protect tenants.

On point (iii), the Housing Act, 1925, s. 1, lays down as an implied term in the landlord's contract with a tenant that he shall keep the premises in all respects reasonably fit for human habitation. The landlord cannot increase the rent because he has performed a duty imposed on him by the terms of the tenancy. Work performed under this section cannot therefore be "improvements or structural alterations" under the Rent Act, 1920, s. 2 (1) (a). The Rent Acts do not alter the contract between landlord and tenant : *Morgan v. Liverpool Corpn.* (5).

McIntyre, on point (ii), referred to *Butcher v. Broadhurst* (6), and *Nightingale v. Loverock* (7). On point (iii) : The replacements and sanitary conveniences were improvements or structural alterations justifying an increase amounting to 8 per cent. of the capital expenditure : *Free v. Callender's Trustees* (8).

Southall in reply.

SIR BOYD MERRIMAN, P. : My brethren desire me to say that they agree with the judgment I am about to read, which will therefore be the judgment of the whole court.

This is an appeal from a decision of His Honour JUDGE CLEMENTS,

sitting at the Rochester County Court, upon the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The appeal raises two questions in connection with the increases in rent which are permitted, by sect. 2 of that Act, to be made in respect of a tenancy to which the Act applies. The first question concerns the interpretation of the definition of "net rent" contained in sect. 12 (1) (c) of the Act, and affects two classes of increase which are permitted in terms of a percentage on the "net rent." The other question relates to the increases permitted in respect of structural alterations. Before I deal with these questions specifically it will be useful to consider the scope of sect. 2 (1) of the Act as a whole.

There are five subjects in respect of which an increase of the standard rent, in the case of what is familiarly known as a statutory tenancy, may be made. Of these the fifth, dealt with by sect. 2 (1) (e), relates to dwelling-houses let by a railway company to persons in the employment of the company, and is irrelevant for present purposes. Of the remaining four the first, dealt with in subsect. (1) (a), relates to expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs). In respect of this expenditure the landlord is allowed to increase the rent by a percentage, varying according to circumstances, of the amount so expended, but the tenant may apply for an order suspending or reducing such increase on the ground that such expenditure is, or was, unnecessary in whole or in part. The second increase, dealt with in subsect. (1) (b), relates to any increase in rates payable by the landlord over the corresponding amount paid by the landlord at the time of the commencement of the statutory tenancy. So far the Act gives effect to the principle established, though in somewhat different language, by the corresponding enactments of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 1 (1) (ii), (iv). The third and fourth "permitted increases" appear for the first time in the Act of 1920. The third, dealt with in subsect. (1) (c), is an arbitrary addition of a percentage which, though the object for which it is given is not expressed in the statute, is generally regarded as a recognition, in favour of the landlord, of the economic conditions which prevailed after the War. The fourth, dealt with in subsect. (1) (d), relates to the landlord's liability for repairs, in respect of which, where the landlord is responsible for the whole of the repairs, a fixed percentage is allowed; and where he is responsible for part but not the whole of the repairs, such lesser sum is allowed as, failing agreement, may be determined by the county court judge. Where, as in this case, the landlord is responsible for the whole of the repairs, the percentage allowed is 25 per cent.; and in such a case, by the combined effect of paras. (c) and (d) of the subsection, 40 per cent. in all is allowed. These increases are often loosely described together as "the 40 per cent.

increase," and as for the purposes of this appeal there is no distinction between the two, I will use that description to avoid unnecessary repetition. The 40 per cent. increase is to be calculated upon the "net rent": this expression in turn is defined in sect. 12 (1) (c) of the Act.

It will be seen at the outset, therefore, that whereas paras. (a) and (b) deal with the reimbursement of the landlord in respect of actual expenditure, the test in respect of the 40 per cent. increase is not actual expenditure by the landlord at all, though it is true that by sect. 2 (2) either the tenant or the sanitary authority may apply to the court for an order suspending the increase on the ground that the house is not reasonably fit for human habitation, or is not otherwise in a reasonable state of repair, until such time as the necessary work is done. In other words, in respect of the two later paragraphs an arbitrary percentage is allowed, not dependent upon actual expenditure, and what is called "net rent" is selected as the basis on which that percentage is to be allowed. It is obvious that the "net rent" is selected as the basis of the calculation so as to show that the object in view is to compensate the landlord for his inability to make a fresh letting in the open market by adding a proportion to what may be supposed to have reached his pocket in respect of the dwelling-house at the time immediately preceding the War; but it goes without saying that a different percentage on some other basis could have produced the same arbitrary result.

As I have said, the first, and most important, of the two points raised in this appeal depends upon the interpretation of the definition "net rent." By sect. 12 (1) (c):

"net rent" means, where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent.

The point arises in connection with the benefit, whether by way of allowance, rebate, deductions or commission, given to a landlord in respect of his assuming by agreement, or being compelled by some public or local statute to undertake the burden of the rates, and may be stated as follows:—Do the words "the amount of such rates," which is the amount to be deducted from the standard rent in order to arrive at the "net rent," mean the full rate which would be levied upon an occupier, or the rate less what I will call, for the sake of brevity, the compounding allowance? In other words, is the deduction which is to be made from the standard rent in order to arrive at the "net rent" the amount paid by the landlord in respect of such rates, or is it the full amount of the rates the liability for which the landlord can discharge by payment of that sum less the compounding allowance? Since what

the landlord is to be allowed to charge is 40 per cent. upon the "net rent," it is manifestly to his advantage to establish that the deduction is of the rate less the compounding allowance, since the smaller the deduction the larger will be the "net rent" on which the percentage is to be calculated. This contention has found favour with the learned county court judge, and the question is whether it is right or not. The amount at stake in connection with the particular tenancy is trifling; but it is common ground that the principle is of importance in connection with a considerable number of tenancies to which the Act applies.

Before I consider the difficulties arising out of the definition of "net rent," I wish to emphasise again the contrast between paras. (a) and (b) of sect. 2 (1) on the one hand and paras. (c) and (d) on the other. Paras. (a) and (b) are designed to effect reimbursement for actual expenditure by the individual landlord. In respect of these permitted increases, expenditure with regard to improvements or structural alterations on the one hand, or increased rates on the other, is the sole test. As regards the poor rate, which historically is the original rate, it is a fundamental principle that rates are levied upon the occupier, apart from special cases provided for by comparatively recent legislation. It is also a commonplace to say that within a given rating area the method of assessment in respect of similar classes of hereditaments must be uniform and that a uniform rate in the pound must be imposed upon each hereditament in the class. The statutory provisions, public or local, compelling or enabling a landlord to assume liability for the rate and allowing him to discharge the liability by a composition in no way infringes this principle, whether the primary liability for the rate remains upon the occupier, or is transferred to the landlord, and, if transferred, whether the transfer is by agreement or by compulsion. Though the liability may be discharged by payment of a lesser sum the rate remains the same throughout. This is clearly seen by reference to sects. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869, which was the public statute relating to compounding the poor rate in force at the material date. I have referred, for the sake of brevity, to the compounding allowance; but the references in the Rent Restrictions Acts to the payment of rates by landlords are necessarily in somewhat general terms, and it may be that the specific reference to compounding allowances in sect. 1 (1) (iv) of the Act of 1915 was deliberately dropped, and the somewhat more general wording of the definition with which we are concerned was used instead in the Act of 1920 because the word "compounding" may not have been sufficiently comprehensive to describe the position under certain local Acts.

With regard to the district rate provided for by the Public Health Act, 1875, s. 211, the matter stands somewhat differently. Subsect. (1) of that section recognises the general principle that the occupier is rate-

able, but by para. (a) the owner, instead of the occupier, may at the option of the urban authority be rated in certain specified cases ; provided that in cases where the owner is rated instead of the occupier he is to be assessed upon such reduced estimate—not being less than two-thirds nor more than four-fifths of the net annual value—as the urban authority deem reasonable, of the net rateable value ascertained for the purpose of the poor rate ; and provided that where such reduced estimate is in respect of tenements, whether occupied or unoccupied, then such estimate may be made upon one-half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate levied on the occupiers. It will be seen that in this case the liability for the rate itself is imposed upon the owner, and is to be assessed on a lower estimate of annual value than would be the case if the occupier (if any) were rated. Even so, however, it is plain that the section, recognising the principle that district rates, like poor rates, are primarily made and levied on the occupier, provides that the reduced assessment of the annual value shall be made on a proportion of the full assessment, in terms of the poor rate, which would be made upon the occupier whether there is or is not such an occupier in fact. Though it must be recognised that a difficulty is created by providing that the owner shall be assessed on a reduced annual value, I am of opinion that the same conception underlies this section as that which underlies sects. 3 and 4 of the Act of 1869—namely, that the landlord is allowed to discharge the full rate by payment of something less. The words “on one half of the rate at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers” must refer to the full assessment, and the words “the rate” in that sentence can only mean the full rate and not the rate payable by the landlord, which can never be the same amount. None of these difficulties would arise if it were permissible to look at the Rating and Valuation Act, 1925, s. 11, which, subject to the power of any rating authority, in whose area a local Act is in force to resolve otherwise, substitutes a uniform system of compounding applicable to all rates for the diverse provisions of various public and local Acts relating to different classes of rates. In this Act it is quite plain that the rate always means the full rate leviable upon the occupier and that the various allowances or deductions in favour of the compounding owner are made therefrom. But it is common ground that, for the purposes of the Increase of Rent Act, 1920, s. 12 (1) (c), it is the various public or local Acts in force in 1920 which must be looked at, though on the different wording of sect. 2 (1) (b) of the Act it was proper to refer to the Rating Act, 1925 (see *Evans v. Baxter* (1)).

With regard to the permitted increase in respect of rates payable by the landlord, it has been held by the House of Lords in *Nicholson v. Jackson* (2), upon the wording of sect. 1 (1) (iv) of the Act of 1915, that

the measure of the increase allowed is the increase less the appropriate compounding allowance. The same has been held, with regard to the increase permitted by sect. 2 (1) (b) of the Act of 1920, by the Divisional Court in *Evans v. Baxter* (1); see also, with regard to a local Act, *Hodgkinson v. Hewitt* (3). It is worth noting in passing that the structure of the Acts of 1915 and 1920 differs somewhat. In the Act of 1915 any increase above the standard rent is prohibited, but with regard to the rates it is enacted by sect. 1 (1) (iv) that the increase in respect of additional rates shall not be deemed to be an increase. By sect. 2 of the Act of 1920, on the other hand, certain increases, of which this is one, are expressly permitted. In both Acts, however, the test is the increase in "the amount for the time being payable by the landlord" over the "corresponding amount paid" in the pre-war period, "the amount payable" being held to be the amount for which the landlord, taking advantage of the enactments in his favour relating to the compounding allowance, could discharge his liability at the later period, and the "corresponding amount paid" at the earlier period being calculated on the same basis.

Counsel for the landlord in this case seeks to apply the same reasoning to the definition of "net rent" and argues that the words "where the landlord . . . paid the rates," read with the words "the amount of such rates" in the definition of "net rent" in sect. 12 (1) (c), must be interpreted in the same way, and that the definition refers, therefore, to the sum for which the landlord can discharge the liability for rates and not to the amount of the rates themselves. In my opinion this argument is fallacious. I see no reason, where the wording is not the same, for importing into the notional calculation under paras. (c) and (d) of sect. 2 (1) an interpretation based on the entirely different conception underlying paras. (a) and (b) of that subsection. It was hardly disputed that the words "the amount of such rates" taken by themselves would naturally be taken to describe the full amount of the rates, but it was said that these words are qualified by the earlier words "where the landlord paid," thus leading to the conclusion that the amount paid in discharge of the rates, and not the amount of the rates themselves, was intended to be deducted. This brings me to a closer examination of the definition of "net rent" in sect. 12 (1) (c). It is agreed that for the purposes of this case the words "at the time by reference to which the standard rent is calculated paid the rates chargeable on . . . the occupier" mean Aug. 3, 1914. The definition, therefore, may be read as follows:—"The expression 'net rent' means, where the landlord on Aug. 3, 1914, paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent." In this definition it is the earlier of the two contrasted periods by reference

to which the landlord is described as having "paid the rates," whereas sect. 1 (1) (iv) of the Act of 1915 begins with the words "where the landlord pays the rates," referring to the later of the two contrasted periods. Also, for some such reason as I have already suggested, there is no specific reference in the definition which we have to construe to the enactments relating to compounding.

Now it is obvious that if the words "the landlord paid the rates" are to be construed as a literal statement of the facts as regards payment particular to the individual landlord, his actual conduct as regards payment in the period comprising Aug. 3, 1914, would affect the whole calculation, with results differing according to the circumstances. Moreover, assuming him to be a landlord who was punctual in the payment of his rates in that period and entitled, therefore, to deduct the compounding allowance, it could never be literally true that on Aug. 3, 1914, he "paid the rates chargeable on the occupier," for in fact he would pay those rates less the compounding allowance. Likewise, in the cases provided for by the Poor Rate Assessment and Collection Act, 1869, s.4, as regards the poor rate, and by the Public Health Act, 1875, s. 211, as regards the district rate, it is not literally true to say that such a landlord "paid the rates which but for the provisions of any Act would be chargeable upon the occupier," since the payment which the landlord made was less than the occupier would have had to make if he were liable to be rated at all, which, *ex hypothesi*, he was not. Moreover, by both these sections, as has already been seen, an owner who was willing in August, 1914, to be rated notwithstanding that the hereditament was unoccupied, was entitled to a further allowance or rebate. In such a case, notwithstanding that there was no occupier at all who could, even hypothetically, "be chargeable but for the provisions of any Act," the landlord had to pay the rate less the appropriate compounding allowance. The phrase last quoted makes nonsense if read as an actual description of that which the individual landlord paid in such circumstances. If the individual facts were really relevant it might be necessary to ascertain, for example, whether in 1914 the landlord took cash to the Town Hall, or, if he paid by cheque, whether it was honoured, and in either event whether he paid punctually or unpunctually so as to earn or forfeit the compounding allowance; or whether, if the landlord failed to pay the full rate, distraint was levied upon the tenant under the Poor Rate Assessment Act, 1869, s. 12, or alternatively whether the landlord was sued for, and execution was issued upon him for the amount of the rates; or whether, failing all other means of levying the rates, the actual landlord was committed to prison for non-payment. Moreover, it would appear that if the landlord made default altogether for that particular period in 1914, no subsequent landlord, however much the rates increased and however punctilious he was in

paying them, could ever claim the permitted increase. But in my opinion all such considerations are beside the mark.

In *Nicholson v. Jackson* (2), the House of Lords held that the opening words of sect. 1 (1) (iv) of the Act of 1915, which, except for the change of tense, correspond closely with the words of the definition of "net rent," meant simply that the landlord was one of the class of landlords who paid rates instead of the occupier. There may be some reason peculiar to this group of legislation which made it impossible for Parliament to indicate this meaning in language less involved. Be that as it may, I see no reason for placing a different interpretation on the words occurring in the definition of "net rent" in sect. 12 (1) (c) of the Act of 1920. If anything it is more imperative so to do than it is in relation to the Act of 1915. Indeed, it was not seriously contended on either side that the words bear any other interpretation. But, when once it is realized that the phrase is nothing more than a description of a class of landlord, there is no reason for allowing the words "the landlord paid" to qualify in any way the plain meaning of the words "the amount of such rates." I am glad to think that this view of the meaning of the words "the amount of such rates" was anticipated *obiter* by LORD CAVE in *Nicholson v. Jackson* (2). In holding (at p. 889), that the words "the amount for the time being payable by the landlord in respect of such rates" meant the amount actually payable by him having regard to his compounding agreement, he added that if the draftsman had intended to refer to the full rates he would surely have used the simpler phrase "the amount of such rates." As the arguments are not reported, it is impossible to say whether or not LORD CAVE was deliberately quoting these words from the Act of 1920, which had already been in force for some time; but it is significant that the noble Lord selected, as describing the full rates in contrast with the rate less the compounding allowance, the very words we are called upon to construe.

Mr. McIntyre also argued that, as the words of the definition were ambiguous, he was entitled to rely on the words "except where the context otherwise requires," which qualify all the definitions in sect. 12; and that as sect. 2 (1) (b) had been construed as referring to the net payment, the context required that in paras. (c) and (d) the same reasoning should be imported into the calculation of the "net rent." I have already said that there seems to be no justification for importing into paragraphs dealing with an arbitrary calculation the construction of a separate paragraph relating to actual facts; but, apart from this consideration, I am unable to see how the application to this definition of the words "except where the context otherwise requires" assists his argument. There is no context for the use of the words "the net rent" except in the two paragraphs relating to the 40 per cent. increase. The definition, therefore, can only refer to this context, and must be

so applied. Such difficulty as there may be in construing the definition cannot be avoided by ignoring it. In my opinion, the judgment of the county court judge on this point was wrong.

The second point can be disposed of more briefly. The learned county court judge held that the respondents were entitled to an increase calculated at the rate of 8 per cent. on the expenditure on certain improvements or structural alterations under sect. 2 (1) (a). It is not disputed that the work done, consisting as it did in the substitution to the satisfaction of the local authority of a modern and efficient sanitary system in place of an antiquated system which did not meet the requirements of the local authority, constituted an improvement and was structural. Mr. Southall, however, relied on the Housing Act, 1925, s. 1, whereby an undertaking that the house will be kept by the landlord during the tenancy in all respects reasonably fit for human habitation is to be implied in the contract for letting for habitation a dwelling-house of a class which includes the dwelling-house in question; and on evidence given by the Chief Sanitary Inspector of the local authority that the houses—that is to say, before the work was done—were not in all respects fit for habitation in accordance with the section. He argued, therefore, that the obligation to do the work was a term of the tenancy, and that it followed from the ordinary principles of contract that the expenditure on such improvements or structural alterations could not be transferred to the tenant during the subsistence of the tenancy. We did not think it necessary to call upon the respondents on this point, but in deference to Mr. Southall's argument, though it was not very strongly pressed, I must say shortly why I think this objection to the county court judge's judgment is untenable.

So far as it is relevant for present purposes, the scheme of the group of sections in Part 1 of the 1925 Act dealing with this obligation of the landlords may be summarised as follows. First, there is the statutory imposition on the owner of the undertaking I have already quoted; but if the owner can satisfy the local authority or, failing them, the Minister of Health that the house cannot without reconstruction be made fit for human habitation, he may give notice of his intention to close the house. If this provision comes into operation it has the same effect as if a closing order had been made, and the local authority may acquire the house compulsorily as if it were land that had been included in a reconstruction scheme on account of the sanitary condition of the premises thereon; subject to this, if the owner fails to comply with the notice the local authority may do the work and charge him with the expenses incurred.

Turning to sect. 2 (1) (a) of the Act of 1920, it is important to observe that the paragraph provides that the tenant may apply to the county court for an order suspending or reducing this permitted increase on

the ground that the expenditure on the improvements or structural alterations of the dwelling-house is, or was, unnecessary in whole or in part. As the subject matter is a dwelling-house, it may, I think, fairly be assumed that in using the word "unnecessary" the legislature meant that the work in respect of which the expenditure was incurred must be necessary for the purpose for which a dwelling-house is used—namely, for human habitation. Mr. Southall's argument, therefore, would involve reading this paragraph somewhat as follows: the landlord may recover a percentage of such expenditure on improvements or structural alterations as is necessary to render the dwelling-house fit for human habitation, but expenditure on improvements or structural alterations incurred by virtue of the obligation imposed by the Housing Act, 1925, s. 1, to keep the house in all respects fit for human habitation is not expenditure on improvements or structural alterations within the meaning of sect. 2 (1) (a) of the Act of 1920. The fallacy seems to me to lie in applying the ordinary principles of contract to the so-called "statutory tenancy." Apart from the Rent Acts, the owner of a dwelling-house on which expenditure in respect of the undertaking imposed by the Housing Act, 1925, was incurred could give the necessary notice to quit and then raise the rent to compensate himself for the expenditure. The "statutory tenancy" is not, properly speaking, a tenancy at all. It confers, as the late LUSH, J., called it in *Keeves v. Dean* (4) "a status of irremovability" on the tenant, though it is true that such terms of the original contract as are applicable survive. It would work an obvious injustice on the owner if he were unable to recover the increase permitted by the Act of 1920 in respect of alterations to a dwelling-house the tenancy of which he cannot terminate by an ordinary notice to quit, because subsequent legislation had imposed in respect of that class of dwelling-house, whether controlled or not, an obligation to make structural alterations of that very character. In respect of the category of houses falling not only within the Housing Act, 1925, s. 1, but also within the Rent Act, 1933, s. 2, the injustice would be still more glaring, inasmuch as by the latter section such houses are excluded from the decontrolling provisions of sect. 2 of the Act of 1923. I am satisfied that the legislature had no such intention, and that the learned county court judge was right in holding that this increase was recoverable.

In terms of money the permitted increase in respect of the structural alterations is 1s. 0 $\frac{1}{4}$ d. per week. In respect of the 40 per cent. increase the amount is 1 $\frac{3}{4}$ d. per week. It follows from my judgment that the amount for which the learned county court judge has given judgment, must be reduced by 1 $\frac{3}{4}$ d. multiplied by the number of weeks in respect of which arrears of rent were claimed; that is, from Sept. 16, 1935, to Jan. 20, 1936. As I am not sure whether those dates are inclusive or exclusive, the parties must work out the arithmetic themselves. The

learned county court judge's order will be varied accordingly. With regard to costs, as most of the time in the court below appears to have been occupied in fighting the issue with regard to structural repairs, which represented a very small proportion of the time expended upon the appeal, I think the justice of the matter will be met if each party bears his own costs below and the appellants have three-quarters of the costs of the appeal.

Leave to appeal to the House of Lords granted to plaintiffs on the following terms :

Plaintiffs undertake to do all printing and supply all copies required by both parties ; to pay the defendant £60 towards his disbursements ; not to enforce any order for costs against the defendant in the House of Lords, Court of Appeal or County Court.

Solicitors : *W. H. Thompson* (for the appellant) ; *Deacon & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

IMPERIAL BANK OF CANADA v. BEGLEY.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Thankerton, Lord Maugham, Sir George Lowndes, Sir Sidney Rowlett), **March 10, 12, 13, April 28, 1936.**]

Agency—Power of attorney—Exercise for agent's own purposes—Estoppel by silence and delay—Ratification.

The respondent, a widow, who had a deposit account with the appellant bank, desired that A., a close friend of the respondent and her husband, should attend to the investment of her money, and with the sole object of making arrangement for such investment at a higher rate of interest than the ordinary bank rate on deposits, she executed a power of attorney in A.'s favour on June 24, 1929, using a printed form in very wide terms supplied by the appellant bank. At that time the respondent had \$13,081 credited to her account. A. also had had for a considerable time an account in the same branch of the bank which had generally showed a debit balance ; and at the date of the execution of the power of attorney his debit balance exceeded \$8,000. On June 29, 1929, A., purporting to act under the power of attorney, transferred from the respondent's account to his own account \$8,500, which, together with a small sum of his own, was sufficient to discharge the whole of his debt to the appellant bank. The assistant manager of the bank took from A. a promissory note payable to the respondent on demand with interest at 7 per cent. per annum, but did not ask on her behalf for security (although the appellants had had a mortgage as security for their debt) nor did they communicate in any way with the respondent or her solicitor. In 1931 the respondent took a promissory note from A. for the sum transferred and interest, and in 1932 having changed her solicitors she demanded payment from the appellant bank of the amount of \$8,500, and on the appellants' refusal the respondent commenced an action for the recovery of that sum :—

HELD : (i) the transfer of the money by A. to his own account made him a constructive trustee for the respondent of the amount transferred.

(ii) the bank having concurred in the transfer for their own benefit became subject to a similar fiduciary obligation.

(iii) any delay or silence on the respondent's part had not prejudiced the bank and there was no defence of estoppel.

(iv) there was no question of ratification since A. had not in transferring the money acted or purported to act as agent of the respondent.

(v) the liability of A. and the bank was not joint, and the respondent was at liberty to sue either or both subject only to the limitation that she could not recover more than the total sum due to her.

[EDITORIAL NOTE.] The main defence of the bank in this case was that the widow had ratified the act of her agent. The position was, however, that though the act was one which the agent had a power to do for a proper purpose, the act here was done for the agent's own purposes, and not in any way in execution of any of the purposes for which the power of attorney was given. He was, in short, using the power of attorney to put his principal's money in his own pocket. The last part of the judgment on the nature of the respondent's remedies and the effect of her acceptance of a promissory note from the fraudulent agent for the amount misappropriated is interesting and useful.

FOR THE CONDITIONS OF RATIFICATION, see HALSBURY, Hailsham Edn., Vol. 1, p. 231, para. 400; and FOR THE CASES, see DIGEST, Vol. 1, pp. 396-399, Nos. 985-1001.]

Cases referred to :

- (1) *Burdick v. Garrick* (1870), 5 Ch. App. 233; 1 Digest 457, 1459.
- (2) *Gray v. Johnston* (1868), L.R. 3 H.L. 1; 3 Digest 186, 368.
- (3) *John v. Dodwell & Co.*, [1918] A.C. 563; 43 Digest 535, 705.
- (4) *Bridgman v. Gill* (1857), 24 Beav. 302; 3 Digest 184, 353.
- (5) *Coleman v. Bucks & Oxon Union Bank*, [1897] 2 Ch. 243; 3 Digest 182, 344.
- (6) *British America Elevator Co. v. Bank of British North America*, [1919] A.C. 658; Digest Supp.
- (7) *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51; Digest Supp.
- (8) *Heath v. Chilton* (1844), 12 M. & W. 632; 1 Digest 561, 2091.
- (9) *Eastern Construction Co., Ltd. v. National Trust Co., Ltd. & Schmidt*, [1914] A.C. 197; 34 Digest 159, 1247.

APPEAL from a judgment of the Supreme Court of Canada reversing a decision of the Appellate Division of the Supreme Court of Alberta, which restored the judgment of the trial judge on the point of this appeal. The facts and the history of the proceedings are fully stated in the judgment.

W. N. Tilley, K.C., for the appellants.

D. N. Pritt, K.C., and *H. G. Nolan, K.C.*, for the respondent.

The judgment of their Lordships was delivered by LORD MAUGHAM.

LORD MAUGHAM: This is an appeal by special leave from a judgment of the Supreme Court of Canada dated Dec. 21, 1934, reversing a judgment of the Appellate Division of the Supreme Court of Alberta dated Mar. 24, 1934, which allowed an appeal from the judgment of BOYLE, J., the trial judge. It may be mentioned here that there was a jury at the trial until the close of the evidence; but counsel for both parties agreed that the jury should be dispensed with and the decision

of the case was left to the trial judge, who gave judgment in favour of the respondent for the full amount of her claim, viz. : for \$13,356 with costs. The judgment was reversed and the action was dismissed by the Appellate Division (MCGILLIVRAY, J.A., dissenting). The Supreme Court of Canada restored the judgment of the trial judge in respect of the claim for \$8,500. The reasons for the judgment were delivered by DUFF, C.J., CROCKETT, HUGHES and MACLEAN, JJ., concurring ; but there was a dissenting judgment by CANNON, J. The present appeal is concerned only with the claim for \$8,500 with interest from June 29, 1929, and it will be unnecessary to deal with anything but that claim.

The respondent is the widow of Robert Wilson Begley, a farmer who died on Dec. 26, 1928, leaving a will under which she was sole executrix and sole beneficiary. She was in no sense a business woman and instead of taking out probate she gave a power of attorney to one, J. W. McElroy, also a farmer, who had been a neighbour and close friend of the respondent and her husband for many years. He was granted administration of the estate with the will annexed ; and on June 27, 1929, having completed the administration of the estate he was discharged. The respondent had had for a considerable time a small savings account with the appellants, the Imperial Bank of Canada, at their Calgary branch, and on the completion of the administration of the estate the proceeds of the estate were deposited to the respondent's credit in the said account. They amounted to the sum of \$13,006. The total sum to her credit in the said account amounted after such deposit to the sum of \$13,081. McElroy had had for a considerable time an account in the same branch of the bank which had generally showed a debit balance ; and at this period his debit balance exceeded \$8,000. The bank for some years had been pressing him for payment. They held security by way of mortgage on McElroy's land, but shortly before the events to be stated this mortgage was postponed to enable McElroy to mortgage the same lands to raise money for the purpose of discharging a part of his indebtedness to the appellants which had amounted in Dec., 1929, to \$18,690. The appellants were apparently not satisfied with their security, and the assistant general manager at Toronto continued to urge Mr. Weaver, the local manager of the bank at Calgary, to obtain payment from McElroy of his debt. In Apr., 1929, Weaver learned that a sale which had been in prospect of one of McElroy's farms to one Herron, from the proceeds of which McElroy had promised to discharge his debt to the bank, might fall through ; and at that time McElroy is said to have stated to Weaver that, if the sale did fall through, he could borrow from the respondent a sufficient sum to pay his debt. The respondent at this time was in the United States ; and on June 7, 1929, McElroy appears to have told Weaver that the respondent had not yet returned from the States and that he would make arrangements with her when

she came back. The respondent returned to Calgary on June 19, 1929. She desired that McElroy should attend to the investment of her money, and on June 24 she executed a power of attorney in his favour, using for the purpose a printed form in very wide terms supplied by the appellants. This power of attorney which in fact bears date June 28, 1929, was executed at the office of Mr. Moyer, a solicitor who had acted for some years for McElroy, and had acted as solicitor in the administration of Robert Wilson Begley's estate. The respondent visited the bank on June 21 with McElroy and Moyer and had a short conversation with Weaver, and she also visited the bank on June 24 and again on June 25. She then arranged with the assistant manager, Chambers, for the transfer of some money for her use in Hamilton, Ontario, where she was going to pay a visit. Nothing, however, was said to her about the suggested discharge of McElroy's indebtedness to the bank out of moneys standing to her credit. On June 26 she left for Hamilton, and three days after her departure, that is on June 29, 1929, McElroy, purporting to act under the power of attorney, transferred from the respondent's savings account to his own account a sum of \$8,500, which, together with a small sum of his own, was sufficient to discharge the whole of his debt to the appellants. The cheque was signed "Victoria Begley, per J. W. McElroy, Atty."; it was drawn in favour of "J. W. McElroy or Order," and was endorsed "Deposited to the credit of J. W. McElroy." McElroy was not called as a witness and the only direct evidence as to what occurred on June 29, 1929, is that of the assistant manager, Chambers. According to his account McElroy had stated that he was going to borrow sufficient money from Mrs. Begley's account to pay off his liability to the bank and was going to give her a promissory note payable on demand with interest at 7 per cent. per annum. Chambers made out the note which McElroy signed and he also made out the cheque in favour of McElroy for \$8,500; and the indebtedness of McElroy to the appellants was in this way apparently discharged. Chambers took the promissory note, but did not ask, on the respondent's behalf, for security (although the appellants had had a third mortgage as security for their debt), nor did they communicate in any way with the respondent or her solicitor, Moyer, who was in Calgary. The respondent had never authorised such a use of the power of attorney, and it was clearly a fraudulent act on the part of McElroy. The object of the power of attorney was explained at the meeting at Moyer's office between the respondent, McElroy and Moyer on June 24, and it is not in dispute that the object was to make arrangement for the investment of the money in her savings account and that McElroy was to try to get, subject to Moyer's approval, investments at a higher rate of interest than the ordinary bank rate on deposits. It is unnecessary for their Lordships to comment upon the participation of the officers of the bank

in this curious transaction, carried through without the smallest endeavour to verify from the respondent herself, who, it may be mentioned incidentally, was in very bad health at the time, that she was lending so large a proportion of her property without security to a man whose financial position was known to the bank to be of an unsatisfactory character. Mr. Tilley, as counsel for the appellants, did not seek to question the view entertained by all the judges who have dealt with the case, including those in the Supreme Court that the bank came under a fiduciary obligation towards the respondent as regards the whole of the sum of \$8,500. There can indeed be no question that in the circumstances of the case *McElroy*, when he signed the cheque in his own favour on the authority of the power of attorney, apart from any liability at common law, became a constructive trustee of the sum of \$8,500 (*Burdick v. Garrick* (1), *Gray v. Johnston* (2), *John v. Dodwell & Co.* (3), at p. 569). Nor can it be doubted that the appellants who for their own benefit concurred in the transaction without any inquiry became subject to a fiduciary obligation similar to that by which *McElroy* was bound (*Bridgman v. Gill* (4), *Coleman v. Bucks & Oxon Union Bank* (5), *B.A. Elevator Co. v. Bank B.N.A.* (6)).

The argument presented to the Board for the appellants was rested entirely upon the subsequent conduct of the respondent during a period exceeding two years. Their Lordships take the same view of those facts as that presented in the elaborate judgment of DUFF, C.J., and it will therefore be necessary to give only such an outline of these facts as will serve to explain their view as to the points of law upon which there has been so considerable a difference of judicial opinion.

The respondent remained at Hamilton, Ontario, on a visit for nearly six months, and returned to Calgary about the middle of Dec., 1929; and it may be mentioned that the appellants did not during her absence inform her of the fact that her money had been used to pay *McElroy's* debt to the bank, nor that the bank held his promissory note in her favour for the amount of \$8,500. The respondent after her return from Hamilton tried without success to obtain information from *McElroy* as to the investments of her money. She was in the Calgary office of the appellants on several occasions. On Dec. 24, 1929, she attended there and had her bank-book written up. There is a conflict of evidence as to what took place. According to Chambers he then produced the promissory note for \$8,500 and showed it to her. She appeared, he said, to be puzzled and said she had not expected *McElroy* to borrow so much. According to her it was not till June, 1930 that she had a conversation of this kind with Chambers and first understood that *McElroy* had taken the \$8,500, though she thought then (no doubt by her own mistake) that the amount was only \$4,500. It seems to their Lordships evident, and indeed it is admitted, that no bank official ever

told the respondent that her money had been used by McElroy to pay his debt to the bank ; and if it is to be assumed that she knew in Dec., 1929, that McElroy had withdrawn \$8,500 it would also be reasonable to assume that she thought the withdrawal was or might be for a proper purpose. On Jan. 2, 1930, she made an unsecured loan of \$1,400 to McElroy, a fact which goes to support her evidence, and it is plain that the trial judge believed that the respondent was giving truthful evidence, and that he regarded the evidence of Chambers with distrust.

In June, 1930, the respondent went to a Calgary hospital to undergo an operation for a serious complaint which had been affecting her health for a long time. Before going to the hospital she went to the bank and ascertained, as she asserts for the first time, that her balance was very much less than she thought it ought to be, and according to her recollection it was then that Chambers produced the promissory note and informed her that McElroy had drawn the money and left the note for her. In the view of their Lordships nothing of substance turns upon the question whether she was told of the withdrawal and of the note in Dec., 1929, or in June, 1930, since it is not suggested that she was told on either occasion that McElroy had used the money for discharging his own debt to the bank. While the respondent was in hospital McElroy told her that he " had taken her money to pay the bank," and he also asserted that Weaver had told him to take it, adding that the respondent was a widow and would want to marry McElroy. Weaver, who was called as a witness, denied the statements so far as he was concerned. The respondent returned to Calgary in Aug., 1930. She saw McElroy in Sept., when he repaid the balance of the \$1,400 loan. She transferred her account to the Bank of Montreal on Sept 10, 1930, and on Dec. 31, 1930, she removed her papers from the safety deposit box in the appellants' office, and at a later date she took away McElroy's promissory note for \$8,500. On Aug. 1, 1931, McElroy at the respondent's request gave her a new promissory note for \$9,419, being principal and accrued interest to that date. The interest rate was reduced to 6 per cent. on the understanding that McElroy would pay off the note in Sept., 1931. In Sept., 1931, the respondent instructed Moyer to endeavour to obtain from McElroy either security or payment. She had a number of interviews with both McElroy and Moyer during the next year without getting any satisfaction from them, and in Sept., 1932, she agreed to renew the note for two years with interest at 6 per cent. There were negotiations for security to be given for her, but they never were completed. About this time she changed her solicitor and took away her papers. Her new solicitors demanded payment from the appellants of the amount of \$8,500 and of certain other cheques drawn by McElroy under the power of attorney. The appellants refused to pay and this action was commenced in Dec., 1932.

At the hearing before the Board the appellants relied on two points : first, that the respondent was estopped from maintaining the action, and secondly that the respondent though entitled to repudiate the action by McElroy in fact had elected to affirm and to ratify it. The point of estoppel can be briefly dealt with. As pointed out in the reasons for the judgment of the Supreme Court of Canada, there is no evidence to support the view that the respondent's silence, that is her delay in complaining to the bank that McElroy had used the money drawn from her account improperly and without her authority, had caused the appellants to alter their position in any way. Nor, on the other hand, is there any reason whatever for contending that the silence upon which the estoppel is sought to be based was, to quote the words of LORD TOMLIN in his speech in *Greenwood v. Martins Bank, Ltd.* (7), at p. 58 :

deliberate and intended to produce the effect which it in fact produced—namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against [a third party].

There was thus on the one hand no evidence of any detriment to the appellants as a consequence of the silence of the respondent, and on the other hand no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants. It is therefore unnecessary to deal with any other ground for rejecting the argument based on estoppel.

Before their Lordships the main argument for the appellants was that the respondent though entitled to repudiate the act of McElroy had chosen with full knowledge to ratify it. In other words she had treated the transaction as a loan by her to McElroy and had accepted and retained the promissory notes given to her by McElroy. This ratification it was urged must date back according to the well-known maxim to the moment when McElroy endorsed the cheque for \$8,500, with the result that the money was lent to McElroy and properly used by him to discharge his debt to the appellants. This is a somewhat surprising conclusion, for it is difficult to see how a contract between the respondent and McElroy entered into some time after the appellants had become constructive trustees for her of the \$8,500 could operate to release them from their equitable liability. If the facts would permit it, the appellants might no doubt argue that they had been released in equity from their liability to the respondent : but to such a contention there are some obvious and conclusive objections. In the first place there is no evidence to suggest that the respondent had any intention whatever of releasing the appellants. In the second place there was no consideration for such a release, and, since there was no deed, this alone would be fatal. In the third place, the respondent could not be held in equity to have released the appellants unless she had full knowledge of her rights, and it seems to be clear that until shortly before the commencement of

her action against the appellants she had no such knowledge. She doubtless knew in June, 1930, that McElroy had used her money to pay off his debt to the appellants, but this fact alone would not have informed a competent man of affairs, still less a woman without business experience, that there was a right of action against the appellants. She did not know and could not be expected to surmise that the appellants had, without explanation and without the smallest inquiry, been parties to the strange transaction with McElroy which their Lordships have thought it sufficient to describe in the moderate terms used above. She thus was without such knowledge of the facts, to say nothing of knowledge of her rights against the appellants, as would be necessary before a Court of Equity could hold her bound by an implied release.

These considerations alone would be sufficient to dispose of the appeal ; but their Lordships are unwilling to leave unanswered the argument based on the alleged ratification by the respondent. It must be remembered that it is not the drawing of the cheque by McElroy, but the use of the proceeds of the cheque which the respondent could properly complain of. What act of McElroy is it which the respondent is said to have ratified ? The appellants must say that it was either the lending of the proceeds to McElroy or the paying of the proceeds to the appellants to discharge McElroy's debt. Both of these suggestions must fail for the simple reason that neither act was done or professed to be done by McElroy acting as agent for the respondent. The first essential to the doctrine of ratification, with its necessary consequence of relating back, is that the agent shall not be acting for himself, but shall be intending to bind a named or ascertainable principal (*HALSBURY'S LAWS OF ENGLAND*, Hailsham Edn., Vol. 1, page 231 ; *Heath v. Chilton* (8), at page 638 ; *Eastern Construction Co. v. National Trust Co.* (9), at page 213). If the suggestion of ratification in this case is analysed it comes to this, that the agent having put some of the principal's money in his pocket, the latter "ratifies" the act. For the reason given this is not possible as a legal conception, since the agent did not take, and could not be deemed to have taken, the money for himself *as agent* for the principal. If the act had been authorised, the contract between the principal and the agent would have been the ordinary contract of loan. That indeed seems to have been what McElroy suggested to Chambers, if he suggested anything honest at all. There can be no room here for the application of the doctrine of ratification. The point was clearly put in the judgment of DUFF, C.J. :

McElroy was not professing to act as her (Mrs. Begley's) agent in paying the bank, and the bank was not receiving the money from anybody acting as the appellant's agent. This is a most important consideration because it follows that, as McElroy did not profess to represent the appellant (Mrs. Begley) in paying the

bank, his act in doing so was not one which the appellant could validly make her own by ratification.

It may be added that the contention that the respondent "adopted" the transaction *ab initio* means nothing in law except that after discovering the fraud she made a contract with McElroy which changed his liability into one of debt, instead of one of damages for breach of duty or for breach of trust. The appellants of course cannot set up or rely on such a contract since they are not parties to it. It is clear that in the circumstances the respondent was not put to her election to sue either McElroy or the appellants: she could sue both or either, subject of course to this that she could not recover more than the total sum due to her. She could indeed have released McElroy and yet have pursued her remedies against the appellants, for there is no question here either of joint liability or of the liability of principal and surety.

For these reasons their Lordships have come to the same conclusion as the Supreme Court of Canada, and they must humbly advise His Majesty that the appeal must be dismissed with costs.

Solicitors: *Lawrence Jones & Co.* (for the appellants); *Blake & Redden* (for the respondents).

[*Reported by S. P. KHAMBATTA, ESQ., Barrister-at-Law.*]

CENTRAL LONDON RAILWAY COMPANY v. COMMISSIONERS OF INLAND REVENUE. LONDON ELECTRIC RAILWAY COMPANY v. COMMISSIONERS OF INLAND REVENUE. METROPOLITAN RAILWAY COMPANY v. COMMISSIONERS OF INLAND REVENUE.

[HOUSE OF LORDS (Viscount Hailsham, L.C., Lord Blanesburgh, Lord Russell of Killowen, Lord Macmillan, Lord Roche), **February 10, 11, 13, 14, and May 21, 1936.**]

Income Tax—Debenture interest charged to capital account under private Act—Whether "payable wholly out of profits or gains brought into charge"—Right of company to retain income tax deducted from interest—All Schedules Rules, rr. 19, 21.

A company, as empowered by a private Act of 1930, raised £850,000 by an issue of debenture stock. By sect. 118 of the private Act, the company was allowed to charge to capital account the interest accruing till 1935 on money so raised. Interest, subject to deduction of income tax, was duly paid partly out of capital and was so debited in the company's accounts. An assessment to income tax was made in respect of the said interest on the ground that it had not been paid out of profits brought into charge to income tax. The company maintained that it was entitled to retain as its own the tax deducted from the interest on the ground that, as there was income in its hands already subjected to tax which it could have used to pay the interest, the payment of interest debited to capital in the company's accounts ought to be treated as having been paid out of taxed profits:—

HELD: as the debiting of the interest to capital was not merely a matter of accounting, but a deliberate decision by the company to

charge the interest in question against capital and not against income, the company was not entitled to retain the tax deducted.

[EDITORIAL NOTE. Cases have arisen before this where the interest on loans has been payable out of a special fund by reason of statutory provision. In such cases there was either no income available for the payment of the interest or no option in the authority to pay it out of income or out of capital. Here the company had the option to charge the interest on the debentures out of income or capital, and with income available, they deliberately charged it to capital. It is in these circumstances now arising for the first time, that it is held that such a payment is not a payment out of profits brought into charge.

FOR INTEREST PAID OUT OF SPECIAL FUNDS, see HALSBURY, Hailsham Edn., Vol. 17, p. 242, para. 489; and FOR THE CASES, see DIGEST, Vol. 28, pp. 73, 74, Nos. 392-397.]

Cases referred to:

- (1) *London County Council v. A.-G.*, [1901] A.C. 26; 28 Digest 73, 392.
- (2) *A.-G. v. Metropolitan Water Board*, [1928] 1 K.B. 833; Digest Supp.
- (3) *A.-G. v. London County Council*, [1907] A.C. 131; 28 Digest 73, 393.
- (4) *Edinburgh Life Assurance Co. v. Lord Advocate*, [1910] A.C. 143; 28 Digest 73, 394.
- (5) *Sugden v. Leeds Corpn.*, [1914] A.C. 483; 28 Digest 74, 397.
- (6) *Birmingham Corpn. v. Inland Revenue Commissioners*, [1930] A.C. 307; Digest Supp.

APPEAL, in each case, from an order of the Court of Appeal reversing an order of FINLAY, J. These were three appeals heard together as each raised the same point for determination. The facts and the arguments are fully referred to in the judgment.

A. M. Latter, K.C., Walter T. Monckton, K.C., and John S. Scrimgeour for the appellants.

The Attorney-General (Sir Donald B. Somervell, K.C.), and Reginald P. Hills, for the respondents.

LORD BLANESBURGH: My Lords, I have had the advantage of reading in print the opinion which my noble and learned friend, LORD MACMILLAN, has prepared and which he is about to deliver. I entirely concur in that opinion and in the motion with which my noble and learned friend proposes to conclude.

LORD MACMILLAN: My Lords, I am authorised by VISCOUNT HAILSHAM, L.C., LORD RUSSELL OF KILLOWEN, and LORD ROCHE to indicate their concurrence in the opinion which I am about to deliver.

In these three appeals, which were heard together, substantially the same question is raised. I propose to follow the example of counsel in selecting as typical the case of the Central London Railway Company. The facts may be briefly stated. In 1930 the railway company by a private Act passed in that session were empowered to raise £850,000 of additional capital by means of an issue of 5 per cent. redeemable debenture stock. By sect. 118 of the Act the railway company were

authorised to charge to capital account for five years the interest accruing on all money raised by the issue. The debenture stock was duly issued and was purchased by certain issuing houses which in turn offered it for sale to the public.

In the year ending Dec. 31, 1930, the railway company paid interest amounting to £4,250 to the holders of this stock. To the extent of £1,909 18s. 1d. this sum was met out of interest on the unexpended proceeds of the issue. The balance of £2,340 1s. 11d. was charged to capital account by the railway company in pursuance of the power to do so conferred by sect. 118 of the Act. In the statutory accounts compiled and published by the railway company in compliance with the Railway Companies (Accounts and Returns) Act, 1911, for the year to Dec. 31, 1930, this sum of £2,340 1s. 11d. appeared as an item in account No. 5, "details of capital expenditure for year ended Dec. 31, 1930," where it was described as "Interest on 5 per cent. Redeemable Debenture Stock (1985/1995) during construction, less interest on unexpended proceeds."

The total interest paid by the railway company in the year 1930 on this and their other debenture stocks was just under £70,000. For the fiscal year ending Apr. 5, 1931, the profits or gains of the railway company as assessed for income tax purposes on the basis of their profits for the year to Dec. 31, 1929, under the Income Tax Act, 1918, sched. D, case I, amounted to over £280,000, apart from an assessment of £7,897 under sched. A and £4,982 of income received under deduction of tax. It will thus be seen that the total interest which the railway company paid to their debenture stockholders in 1930 was a much smaller sum than their assessed income for tax purposes for the year 1930-31.

On paying the £4,250 of interest to their new debenture stock-holders in the year 1930, the railway company deducted the income tax thereon. They maintain that they are entitled to retain for their own uses the whole of the tax so deducted and are not bound to account for any part of it to the Crown. No question has been raised as to their right to retain the tax on the £1,909 18s. 1d. of interest which they charged to revenue account. It is solely with the question of their right to retain the tax deducted from the £2,340 1s. 11d. which they debited to capital account that the present case is concerned.

To answer this question your Lordships have once more to consider rules 19 and 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918. These two rules and the previous similar enactments which they replaced have on several occasions been the subject of examination by your Lordships.

The material words of rule 19 are as follows :

19.—(1) Where any yearly interest . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person

entitled to such interest, . . . but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest . . . and the person liable to make such payment . . . shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon . . .

Rule 21 (1), deals with the converse case of payments of interest not payable, or not wholly payable, out of profits or gains brought into charge and requires the payer in such cases to deduct tax when making payment and to deliver an account of the amount of tax so deducted to the commissioners, who are thereupon directed to assess and charge the same against the payer.

It will thus be seen that the railway company, in order to justify the retention of the tax deducted by them in paying the £2,340 1s. 11d. of interest must show that it was "payable wholly out of profits or gains brought into charge to tax."

In ordinary course a company in preparing its profit and loss account, in order to ascertain the profit on its year's trading available for dividend, debits revenue with the interest which it has had to pay to its debenture holders who are among its creditors. But in compiling a return of its profits or gains for tax purposes a company is not permitted to deduct such interest. This is forbidden by the rules applicable to cases I and II of sched. D, r. 3, which enacts that

in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . (1) any annual interest. . . .

Consequently, as the amount of the debenture interest is not a permissible deduction, it forms an element in the computation of the company's profits or gains for income tax purposes, on which it pays tax in the following year. But in a question with its debenture holders the company is entitled to deduct income tax from the interest which it pays to them and to retain the tax so deducted if the interest is "payable out of profits or gains brought into charge to tax."

The requirement that the company shall, at any rate *primo loco*, pay income tax in respect of what it has to pay out to its debenture holders is part of the general scheme of deduction of tax at the source. The qualified right which it possesses to recoup itself by retaining the tax which it in turn deducts in making payment to its debenture holders of the interest which it owes to them has been justified on various grounds, as for example that the company may be regarded as sharing its income with its debenture holders and, having paid the tax both on its own and on their share, is properly entitled on handing the debenture holders their share to deduct and retain the tax it has paid on that share. [*Cf.* per LORD DAVEY in *London County Council v. Attorney-General* (1)

at p. 42.] The object is plainly to avoid double taxation of the same income.

But the language in which rule 19 is expressed gives rise to much difficulty. The critical words "payable out of profits or gains brought into charge to tax" manifestly cannot be read literally. If the expression "profits or gains brought into charge to tax" be taken to mean the assessed profits or gains on which the company is charged to and pays tax in the year in which it makes the payment of interest, then the statutory requirement could never be fulfilled when the assessed profits are based on a return made by the company of its actual profits for the preceding year. It is only where interest is paid out of income taxed in the year of its receipt as, e.g., out of dividends taxed by deduction, that the payment can be made out of actual profits or gains brought into charge in the same year as that in which the payment of interest is made, for it is only in such a case that assessed income is based on the year of charge and not on the preceding year. An illustration will make the matter clear. Assume that the results of a company's trading for three consecutive years are as follows :

1st Year. Profits before payment of debenture interest, £10,000.

2nd Year. Profits before payment of debenture interest, Nil.

3rd Year. Profits before payment of debenture interest, £10,000.

and assume that the company has in each year to pay £5,000 of debenture interest. In the second year the company is assessed and charged to tax in respect of the £10,000 profits of the preceding year, but it has got no actual profits out of which to pay its debenture interest. It certainly cannot pay its debenture interest out of the notional income which the Income Tax Acts attribute to it for tax purposes. A real payment cannot be made out of an imaginary fund nor can it be "payable" out of an imaginary fund. Assume the company borrows from the bank £5,000 to enable it to pay its debenture interest. Is it then entitled to retain the tax which it deducts on making payment of interest to its debenture holders out of this borrowed money? Can the interest so paid be said to be "payable out of profits or gains brought into charge to tax"?

Then take the third year. This time the company's assessed income for tax purposes is nil and it pays no income tax in that year. Yet it has ample profits out of which to pay its debenture interest, and it does in fact pay it out of these profits under deduction of tax. Is the company entitled to retain the tax so paid as being "payable out of profits or gains brought into charge to tax"?

Once, then, it is recognised that a real payment of interest cannot in fact be "payable" out of a notional assessed sum, it becomes necessary to find an interpretation of the words of the rule which will

not attribute to it so absurd a conception and which will bring the requirement which it prescribes within the realm of reality.

The difficulty of interpretation which I have just described is not discussed in the earlier cases. It seems to have emerged for the first time in the courts in the case of *Attorney-General v. Metropolitan Water Board* (2). The facts there resembled those in the illustration which I have already given. LORD HANWORTH, M.R., at p. 842 thus poses the question: Are the words "payable wholly out of profits or gains brought into charge," he asks, "to be interpreted as meaning profits or gains that have in fact actually been brought 'into charge' or do they mean 'profits and gains that are subject to charge and will in due course become factors in the assessment of the liability of the appellants to tax'?" This question he answers in favour of the first interpretation and so do SARGANT and LAWRENCE, L.JJ. But I do not find in any of the judgments an explanation of how a real payment can be made out of a notional income. LAWRENCE, L.J., alone alludes to this difficulty, and at p. 851 seeks to solve it by construing the words "payable out of" as equivalent to "properly chargeable against." He says:

The meaning and effect of the rule is that, in order to come within its scope, the annual payments must be of such a character that they can properly be charged against the taxable income—e.g., if the taxable income consists of the profits of a business, the annual payment must be one that is charged upon the profits of that business, and not a payment unconnected with it. . . . "Profits or gains brought into charge to tax" means the taxable and not the actual profits or gains in the year of assessment,

and the anomalies which would result from any other reading are adduced in support of this conclusion. The general principle of the *Metropolitan Water Board* case (2) may be stated thus: Whenever in any year the amount of interest paid by the taxpayer does not exceed the amount of his profits or gains as assessed for income tax purposes for that year, then the interest paid in that year is, within the statutory meaning "payable out of profits or gains brought into charge to tax" and the taxpayer is entitled to retain the tax which he deducts in paying the interest. There are qualifications of this principle, but that is the general effect of the decision.

My Lords, the result of applying this principle is that, to revert to my illustration, the company would be entitled to retain the deducted tax in the second year but not in the third year, because in the second year its assessed income for tax purposes in that year exceeded the amount of the debenture interest paid in that year, while in the third year its assessed income for tax purposes was nil and therefore did not cover any part of the debenture interest paid. The incongruous result is that in the year in which the company paid its debenture interest out

of its actual profits it is to be held disentitled to retain the deducted tax, while in the year in which it had no profits out of which to pay its debenture interest and had to borrow from the bank to enable it to do so it is to be held entitled to retain the deducted interest. And this is justified on the ground that in the former year the debenture interest was not "payable out of profits or gains brought into charge" while in the latter year it was "payable out of profits or gains brought into charge," whereas the truth is that in neither year was the debenture interest in fact paid out of "profits or gains brought into charge," if those words mean the notional income attributed to the company in each of these years for income tax purposes.

On the other hand, it may be said that it is only fair that in the second year in my illustration when the company has made no actual profits but has had to pay tax on assessed profits of £10,000 it should be entitled to recoup itself by retaining the tax which it has deducted in that year on paying its debenture interest. Moreover, if tax is deducted on paying interest in year A out of the actual profits of that year, those profits will not be assessed and become chargeable to tax till the following year B; consequently the taxpayer will retain the tax deducted in year A but the Crown will have to wait till year B to get its tax on the profits out of which the interest was paid in year A.

The legislature has in one instance at least shown itself not averse from such a result as I have just indicated. The Finance Act, 1931, s. 7 (1), dealing with rule 20 which relates to the deduction of tax from dividends, enacts that the rule shall

be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period.

In other words, tax may apparently be deducted from dividends (and retained) if the dividends are paid out of profits which have been, or will form, the subject of assessment and charge in some other year.

My Lords, it is remarkable that until the *Metropolitan Water Board's* case (2) this aspect of the problem presented by the words "payable out of profits or gains brought into charge to tax" does not seem to have been judicially noticed. All the cases which have reached this House were concerned with other questions. The leading case of *London County Council v. Attorney-General* (1) decided that "profits or gains brought into charge" meant the totality of the taxpayer's assessed income under all schedules and not merely the portion of his income assessed under sched. D. In the special circumstances of the second

London County Council case (3) it was held that the County Council was not entitled to reckon as "profits or gains brought into charge" for the purpose of rule 19 the sched. A assessment of premises belonging to and occupied by the county council. In neither of these cases does the language employed by the noble and learned Lords convey any hint that they were thinking of payments of interest out of a notional fund. Thus in the first of these cases LORD MACNAGHTEN (at p. 34) speaks of the interest being "in fact paid out of profits or gains 'brought into charge'"; and in the second of these cases the keynote of the speech of LORD LOREBURN, L.C., is to be found in the sentence at p. 134:

This sum represents interest paid by the county council to the holders of Consolidated Stock which is not paid out of profits or gains brought into charge. It is paid out of rates.

I cannot doubt that LORD LOREBURN, L.C. was here contrasting actual payment out of actual rates with actual payment out of actual profits and gains.

The subsequent case of the *Edinburgh Life Assurance Company v. Lord Advocate* (4) decided that the requirement was satisfied if the amount of the profits and gains brought into charge was sufficient to cover the amount of the annuities disbursed, from which tax was deducted, and that it was not necessary, in order to justify retention of the deducted tax, that the annuities should be specifically paid out of these profits and gains. Then in *Sugden v. Leeds Corporation* (5) and in *Birmingham Corporation v. Inland Revenue Commissioners* (6) the real point was whether the interest in question could properly and lawfully be paid out of the profits and gains brought into charge. Again I find that in the speeches of the noble and learned Lords in these later cases the language employed is appropriate to payment out of an actual rather than out of a merely notional fund. Thus in the former case VISCOUNT HALDANE, L.C., at p. 491 says that "in each case the question is whether the annual payments taxed are actually and properly payable out of the profits." But the next sentence is a little disconcerting. "If they are," VISCOUNT HALDANE, L.C., proceeds, "these profits are treated by the Acts as diminished *pro tanto* in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax that he has already paid." I confess to some difficulty in understanding how notional profits—if by "profits" is meant "assessed profits"—can be "diminished *pro tanto* in the hands of the owner" by payment out of actual profits. I am bound, however, to say that the implication of these cases is that the words "profits or gains brought into charge to tax" were there understood to refer to profits or gains as assessed to tax, although I do not think that attention was directed to the practical difficulty of paying actual interest out

of a notional income. But it is unprofitable to scrutinise the language of these cases and unjustifiable to criticise it when once it is seen that they are not directly concerned with that difficulty.

My Lords, the present stated case and the judgment of the Court of Appeal naturally and properly proceed on the interpretation of rule 19 which was adopted in the *Metropolitan Water Board's* case (2), that is to say, they treat as the relevant "profits or gains brought into charge to tax" in the year in which the interest in question was paid the profits or gains of the railway company as assessed for tax purposes in that year. Thus the commissioners in the stated case find that the railway company in that year "possessed taxed income amply sufficient to satisfy the payment in question." I find it difficult to understand how a notional income can be possessed, but I assume that what is meant is that in the year in which the interest was paid the railway company was charged with income tax on a sum in excess of the interest paid. In point of fact, the actual profits of the railway company for the year 1930 as distinguished from their assessed profits for 1930-31 would also appear from the accounts scheduled to the stated case to have been largely in excess of the debenture interest paid in 1930, but this circumstance was not adverted to and has throughout been treated as irrelevant.

At your Lordships' bar neither party challenged the soundness of the decision in the *Metropolitan Water Board's* case (2) and the House is not on this occasion required to review it. I am not to be taken as accepting it or doubting it, for I should not like to come to any conclusion upon so difficult a point except after full argument. Your Lordships may well ask why I have thought it right to discuss so laboriously what it is not necessary to decide. My justification, if it be a justification, is that on the previous occasions when rules 19 and 21 have been expounded in this House, the difficulty in their practical interpretation with which I have been dealing has not been in issue and so far from any certain conclusion upon it having been expressed, the matter has been left in an ambiguous position. I think it would be unfortunate if your Lordships were once more to ignore the existence of this difficulty or to leave it to inference or conjecture whether the principle of the *Metropolitan Water Board's* case (2) had or had not been adopted by this House. I am content if I have made it clear that the matter has not in my opinion been concluded by any judgment hitherto of this House and that so far as the present case is concerned the point is still left open for your Lordships' consideration should it arise on a future occasion. It is perhaps not too much to hope that, in view of the practical importance of the matter the legislature may see fit to put it beyond doubt, as they have sought to do in the case of rule 20.

I now come to the special circumstances of the case in hand. Accepting

the position that in the year in which the interest in question was paid there were "profits or gains" of the railway company "brought into charge to tax," in the sense of income assessed and charged to tax in that year, in excess of the amount of interest paid, there remains the question whether the interest was "payable" out of these "profits or gains"? The word "payable" is used in rules 19, 21 (1); "paid" is used in rule 19 (2) relating to patent royalties, and in sect. 36 (1) which deals with interest on bank advances. There are passages in cases in this House in which "payable" appears to have been read in this connection as equivalent to "paid" or "may be deemed to have been paid." (See, e.g., per LORD ATKINSON in *Sugden v. Leeds Corporation* (5) at p. 499). For the present purpose the difference is in my view immaterial.

Now it is true that the railway company could lawfully, if they chose have paid the interest in question out of their profits, and it is also true that the interest was paid out of a general banking account which contained sufficient profits (though these profits were not their assessed profits—a difficulty which still haunts me). But the interest was actually paid out of capital, and capital was the real source of payment. If the debiting of the interest were merely a matter of domestic accounting I should not be disposed to lay much stress upon it. But in my opinion it was much more than this. There was a deliberate decision to charge the sum in question against capital and not against revenue. That being so, I do not see how the railway company can claim to retain the tax on this interest paid out of capital when the right to retain tax is conditional on the interest being payable out of profits. If the interest had been paid out of actual profits the sum so paid would have figured in the railway company's return of profits to be charged to tax in the next year; but the £2,340 ls. 11d. has never appeared and will never appear in any return by the railway company for tax purposes, for it is a payment out of capital. Consequently the Crown will never receive any tax either from the railway company or from the debenture holders in respect of the interest paid to the latter in 1930, if the railway company are not held accountable to the Crown for the tax which they deducted. The theory of the notional taxed fund covering the amount of the interest paid does not fit such a case, for the transaction is outside the region of profits whether notional or actual. By their own deliberate act the railway company have made this sum not payable out of profits. It is nothing to the purpose that theoretically the railway company might in some future year carry this sum of £2,340 ls. 11d. back into profit and loss account as income. As to whether in the circumstances they could competently do so I express no opinion. But in the tax year in question they have chosen not to debit this sum to revenue account and consequently have *pro tanto* prevented the diminution of the dividend fund

in the distribution of which among their shareholders they have deducted tax and, as they were entitled to do, have retained the tax deducted.

My Lords, I do not think that the same sum can be utilised by the railway company to render them those two inconsistent services in the same tax year, so as to entitle them first to attribute the £2,340 1s. 11*d.* to the payment of interest to their creditors and claim to retain the tax deducted therefrom as if it were paid out of revenue and then by debiting it to capital to enhance the dividend fund and claim to retain the tax deducted from their shareholders on paying them their dividends. Whatever view be taken of the meaning of rule 19 I do not think that the railway company can bring such a case within it.

The material facts, though of course not the figures, in the case of the London Electric Railway Company are identical with those of the Central London Railway Company's case and the same result must follow.

In the appeal of the Metropolitan Railway Company there is this distinction that the company there are seeking to recover under sect. 36 of the Act of 1918 income tax on certain sums of interest paid by them on money borrowed from their bank, which interest they debited to capital account. But for the present purpose this is a distinction without a difference and no independent argument was submitted on this company's behalf.

My opinion accordingly is that all three appeals should be dismissed and that the order of the Court of Appeal in each case should be affirmed. The respondents should have their costs from the appellants but as all three cases were heard together there should be a limitation as regards the hearing before your Lordships to one set of costs.

Appeals dismissed with costs.

Solicitors : *Bircham & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WILLIAM CORY & SON, LIMITED *v.* DORMAN LONG & COMPANY, LIMITED.

[COURT OF APPEAL (Slesser and Romer, L.JJ. and Finlay, J.), **May 4, 1936.**]

Shipping—Collision—Limitation of liability—Owner or charterer by demise—Merchant Shipping Act, 1894 (c. 60), s. 503 (1) (ii)—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (c. 32), s. 1—Merchant Shipping Act, 1906 (c. 48), s. 71—Merchant Shipping Act 1921 (c. 28), s. 1 (2).

For the purposes of certain constructional work the plaintiffs supplied the defendants with barges for the removal of soil. By the negligence of a bargee damage was done to a coffer dam, part of the defendants' works, and in previous proceedings, the plaintiffs were held to be liable. The present action was brought under the Merchant Shipping Act, 1894, s. 503, to limit their liability to £8 for each ton of the ship's tonnage. The plaintiffs had in 1916 formed a subsidiary company, Cory Lighterage, Ltd. and all lighters were transferred to the new company and the men employed on them became employees of the subsidiary company. From 1917 the management of the subsidiary company was carried on by the principal company and in 1927 a notice was sent out that trading in the name of the subsidiary company was to cease. The company itself, however, continued to exist, and although all agreements with third parties were made with the principal company, all profits were credited to the subsidiary company and all expenses, wages and the like were debited against it. There was not at any time any document in writing transferring the property or any rights therein from the subsidiary company to the principal company. In these circumstances the question arose whether the plaintiffs were the "owners" or the charterers by demise of the barge within Merchant Shipping Act, 1894, s. 503, as amended by Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1, Merchant Shipping Act, 1906, s. 71, and Merchant Shipping Act, 1921, s. 1 (2).:—

HELD: the plaintiffs were neither the owners nor the charterers by demise of the barge and were not entitled to limit their liability under the Merchant Shipping Act, 1894, s. 503.

[EDITORIAL NOTE.] This is purely an action for the limitation of liability and the point is whether the plaintiffs were the owners or the charterers by demise of the barge. The point arises out of the formation by the plaintiffs of a subsidiary company to transact all lighterage business, but for their own reasons they later took all such business back into their own hands. There had been a transfer of property on the formation of the subsidiary company, but there was no document whatever in the nature of a re-transfer when it was subsequently for all practical purposes discontinued. The case is interesting in that the circumstances were such as to render the plaintiffs liable for the damage done, but not such as to enable them to take advantage of the provisions limiting liability.

AS TO LIMITATION OF LIABILITY OF SHIPOWNERS, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 612-617, paras. 964-973; and FOR CASES, see DIGEST, Vol. 41, pp. 916-917, Nos. 8072-8083.]

Cases referred to :

- (1) *Baumwoll Manufactur Von Carl Scheibler v. Furness* [1893] A.C. 8; 4, Digest 200, 383.

- (2) *Sir John Jackson, Ltd. v. Blanche (Owners) The Hopper No. 66*, [1908] A.C. 126 ; 41 Digest 917, 8080.
 (3) *Lidgett v. Williams* (1845), 4 Hare, 456 ; 41 Digest 320, 1792.

APPEAL from a decision of BRANSON, J., given on Oct. 15, 1935, in an action for the limitation of liability under the Merchant Shipping Act, 1894, s. 503. BRANSON, J., held that the plaintiffs were not owners or charterers within the section and dismissed the action. The plaintiffs appealed.

The previous proceedings and the circumstances of the present case for the limitation of liability are fully set out in the judgment of SLESSER, L.J.

K. Carpmael, K.C., and *E. E. Addis* for the appellants, the plaintiffs.

Lewis Noad, K.C., and *W. L. McNair* for the respondents, the defendants.

SLESSER, L.J. : This appeal fails. It is an appeal from the decision of BRANSON, J., which follows a former decision of the same learned judge dealing with the same matter. The material circumstances of the case are these. Messrs. Dorman Long & Co., Ltd., the constructional engineers, were engaged under a contract with the West Ham Corporation to construct a bridge over the western entrance of certain docks. For that purpose it became necessary to construct a coffer dam and they made a contract with Messrs. William Cory & Son, Ltd., for the supply of barges to take away the soil. One of these barges was called the "Turk" and on June 22, 1933, a bargee on the "Turk" so negligently brought the "Turk" into collision with the coffer dam that the coffer dam was caused to collapse, whereby damage was suffered to the structure of the coffer dam.

That action, which was heard by BRANSON, J., in the first place in Mar., 1934, was determined in this manner. There having been two defendants sued, whom I will mention in a moment, the learned judge decided that one was responsible and the other was not. The two defendants sued were Cory & Son, Ltd., and another company called Cory Lighterage, Ltd. The question in that case was which of these two companies was responsible for the negligence of the bargee on the "Turk." It was in respect of his negligence that liability was claimed against the company. The learned judge came to the conclusion that Mr. Elliott, the negligent bargee, was the servant of the first defendants, that is to say, William Cory & Son, Ltd., and not the servant of the Lighterage company. That case went to the Court of Appeal, which refused to disturb the finding of BRANSON, J.

In those circumstances the present case arose ; and it arose because by reason of the provisions of the Merchant Shipping Acts, in certain cases where there is liability in damages of owners of ships, in the case of

an occurrence taking place without their actual fault or privity, the damages for which they might otherwise be liable are limited. Mr. Carpmael on behalf of his clients seeks here to avail himself of that limitation. The limitation applies only in cases where the material section is satisfied. The Merchant Shipping Act, 1894, s. 503 (1) (ii) provides that the damage in such a case shall, in respect of loss or damage to vessels, goods, merchandise or other things, be an aggregate amount not exceeding £8 for each ton of their ship's tonnage. There is no dispute as to the figures in this case. If that limitation can be applied, the amount of damage is considerably less than the sum which otherwise would fall to be awarded.

Under that section, the benefits of the section accrue to the owners of a ship. There is an amendment to that provision by the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1, to the effect that :

The limitation of the liability of the owners of any ship set by the Merchant Shipping Act, 1894, s. 503, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship.

This, it is not disputed, is sufficiently wide to cover the present case.

By the Merchant Shipping Act, 1906, s. 71, which is one of the sections to be considered in this case, it is provided that :

Sects. 502 to 509 of the principal Act shall be read so that the word "owner" shall be deemed to include any charterer to whom the ship is demised.

There is yet a further extension by the Merchant Shipping Act, 1921, s. 1 (2), that the expression "owner" shall include any hirer who has contracted to take over the sole charge and management thereof.

In this case, the learned judge has found in his judgment, after consideration of certain facts which I shall mention, that it is not possible for Cory & Son, Ltd., to bring themselves within either the original definition in the Act of 1894 or the extended definitions in the Acts of 1906 and 1921. He has, therefore, given judgment against them in this action, thereby making them liable for the full damages to be ascertained, apart from the statutory limitation. From that decision appeal is brought to this court.

The reason why Messrs. Cory & Son, Ltd., say that they are the owners of this ship within the meaning of sect. 503 of the principal Act of 1894, or alternatively are charterers to whom the ship has been demised under sect. 71 of the Act of 1906, are these : Messrs. William Cory & Son, Ltd., are the well known coal merchants, who at one time owned barges ; but there was formed, under their auspices, no doubt, a subsidiary

company called Cory Lighterage, Ltd. Prior to 1916, the plaintiffs, William Cory & Son, Ltd., themselves carried on a large lighterage business, but in that year they caused to be incorporated this new company, Cory Lighterage, Ltd., and all their lighters were transferred to this new company, Cory Lighterage, Ltd., who became thereby the owners of the lighters, and thus, among other barges, then or subsequently the Lighterage company became the owners of the "Turk." The servants who were employed upon these lighters, including the "Turk," became the servants of this new company, Cory Lighterage, Ltd.; books of account were opened for the new company; it had a board of directors of whom, it is true, all but one were directors of the plaintiff company, but they in all respects carried on their business and made contracts and employed servants and generally organised and carried on this business of lighterage work as an entity separate from Messrs. William Cory & Son, Ltd. Had this accident happened at that time, I think there can have been little doubt that anybody who had been negligent on a barge in 1916, after this company had been formed, would have been a servant of the Lighterage company.

A new arrangement was made in 1917. At that time it was decided that the management of the Lighterage company, which they had formerly conducted themselves, should be carried on in the future by Messrs. William Cory & Son, Ltd., and down to 1927 it appeared that matters went on in that way. In 1927 a minute was passed by the Lighterage company to the effect that all trading by them should cease. The minute was actually carried by the management committee of William Cory & Son, Ltd., but apparently that was agreed between the two companies; at any rate a notice was sent out from Cory & Son, Ltd., to the various persons with whom they were in business—there is one exhibited dated July 27—that the secretary had been instructed to advise that at the earliest possible date trading in the name of the Cory Lighterage Ltd., was to cease, save for contracts which are then running in the name of Cory Lighterage. It appears to be the case, as the learned judge finds, that thereafter the contracts with third parties were actually made with Cory & Sons, Ltd., but the Cory Lighterage company continued to exist, and the evidence goes to show that, although the agreements with third parties were made in the name of William Cory & Son, Ltd., nevertheless all the profits which accrued from the trading transactions were accounted for in the books of the Lighterage company and that all the expenses of earning the profits, the wages and the like, were all accounted for as debits to the Lighterage company. There is no minute of any change in the manner of conducting the business which goes to show, as Mr. Carpmael contends, that William Cory & Son, Ltd., had become principals in the transaction. I think the learned judge on the evidence was entitled and indeed could not avoid coming to the con-

clusion that the only changes which took place, either in 1917 or in 1927, were that, as regards management between William Cory & Son, Ltd., and Cory Lighterage, Ltd., William Cory & Son, Ltd., were entrusted with the duties of management, but that, as before, the actual principals remained the Lighterage company at all material times. Now, in those circumstances Mr. Carpmael argues that he can bring himself within the sections to which I have referred. With regard to the section of the principal Act it will be remembered that in the Act of 1894 there is no express reference to a charterer at all; that is only brought in by the later Act. He has to show, within the meaning of that earlier section limiting his liability, that he is an owner.

A number of cases have been cited to us on this point, and there are two cases in the House of Lords to which consideration must be given. The first case is a case in 1893, the case of *Baumwoll Manufactur Von Carl Scheibler v. Furness* (1). There it is said:

The owner of a ship, registered as such and as the managing owner under the Merchant Shipping Act, 1876, who has parted with the possession and control of the ship under a charterparty to the charterer, is not liable for the loss of goods shipped under bills of lading signed by the captain who is the servant of the charterer and not of the owner and who has no authority from the owner to pledge his credit, although the shipper of the goods has no notice of those facts.

In that case, as the headnote recites, the parting with the possession and control took effect under a charterparty and the effect was, in substance, to put the charterer, as LORD HERSCHELL, L.C., says, substantially in ownership of the vessel during the period of the charter. It is pointed out by LORD HERSCHELL, L.C., on p. 16:

that this is a case in which by the charterparty the charterer has become, *pro hac vice* and during the term of the charter, the owner of the vessel, when one is considering the rights and liabilities which arise from the acts of the master, and the crew of the vessel.

Therefore it was held that, notwithstanding the registration remained in the owner, for the purpose of considering the liability there the charterer was to be treated for that purpose *pro hac vice* as owner of the vessel.

The second case, which is really to a like effect, is *Sir John Jackson, Ltd. v. Blanche (Owners)* (2). That decides:

The charterer of a ship by demise who has control over her and navigates her by his own master and crew is "owner" of the ship within the Merchant Shipping Act, 1894, ss. 503, 504, and entitled to the limitation of liability to damages conferred upon "owners" by those sections.

Now that case, were the facts of it at all similar to the present ones, would be a very important case in Mr. Carpmael's favour, because it is dealing with these very matters; but, in my view, the more these cases are examined the more do they stand out in contrast to the circumstances

of the present case. In that case LORD LOREBURN, L.C., on p. 130 said this :

It being thus ascertained that the word "owner" does in some parts of the Merchant Shipping Act, 1894, include charterers by demise, is it so in sect. 503 ?

He comes to the conclusion, notwithstanding the fact that there was, as I have said, no reference to charterers by demise at that time in the section of the Merchant Shipping Act, nevertheless they may be included under the heading "owners," and, speaking of the definition of "owners," points out that "it must of necessity also include a charterer by demise who has control of the ship and navigates her with his own master and crew. Otherwise the operation of this Act becomes impracticable. LORD ATKINSON, on p. 136 says :

I see no reason why the word "owner" or "owners" when used in sects. 503 and 504, should not be construed, as it must be construed in many other sections, so as to include a charterer by demise.

In consequence, I assume, of a doubt which had existed before the House of Lords had come to that final decision, dealing with the matter as it stood, namely, the decisions of the lower courts to the contrary effect, it had been provided by the later Act, sect. 71 of the Act of 1906, that the word "owner" should be deemed to include any charterer whose ship is demised.

A preliminary difficulty arises in this case upon which I do not think it necessary to express any final opinion. It was whether, on any view, William Cory & Son, Ltd., can be said here to be charterers. In contradistinction to all the cases that have been considered, there is no document in writing in this case of any kind transferring any of the rights, upon which William Cory & Son, Ltd., rely, from the Lighterage company to William Cory & Son, Ltd., which can be said to be in the nature of a charter. It has been said on the authority as far as I know of an observation of WIGRAM, V.-C., in *Lidgett v. Williams* (3), that the rights in a ship can be transferred by charter orally. That passage is quoted in several of the text books. There is a passage for example in CARVER to that effect, but when the text book is looked at on that particular point, the only authority is that case. For myself, I wish to leave the matter open. I must confess that I feel the gravest doubts whether it is possible to transfer property by a charter when there is no instrument of any kind. The history of the charterparty shows it was developed in the Law Merchant from indenture and earlier documents and that the charterparties had always to be evidenced in writing. A charterparty is an indenture of covenants and agreements made between merchants and mariners concerning their sea affairs (TERMES DE LA LEY); so also I doubt whether a person contracting orally for carriage by sea can properly be called a charterer, which is the word employed in sect. 71 of the 1906 Act.

I do not think it necessary, however, in this case to express a final opinion upon the point which might contradict the opinion expressed by WIGRAM, V.-C., for this reason, that there is here, in my opinion, upon the finding of the learned judge nothing to constitute a transference of the ownership of the ship, either by charterparty in writing or orally.

But Mr. Carpmael says alternatively : if this transference be not done by charter, then on the evidence in any event William Cory & Son, Ltd., were owners within the meaning of the Act of 1894, quite apart from the 1906 Act at all. He says that the evidence goes to show that they controlled and navigated the ship and, therefore, for that purpose were sufficiently an owner within the observations of LORD HERSCHELL, L.C., LORD LOREBURN, L.C., and LORD ATKINSON, to which I have referred.

As to that, I think that the learned judge has come to a conclusion which it is impossible to reconcile with such a view. The learned judge, as I read his judgment, has decided that, in making this contract with Dorman Long & Co., Ltd., William Cory & Son, Ltd., were merely acting as the agents of the Lighterage company and they were not principals. He has come to the conclusion that the Lighterage company were at material times still receiving the profits of this and similar contracts and were being made liable for the debits and the like and that they were still in truth the owners of this lighter for all relevant purposes.

In those circumstances, holding that the learned judge was fully entitled to come to that decision, it follows that the appellants cannot avail themselves of these Acts. The appeal must be dismissed with costs.

ROMER, L.J. : I agree. I confess I feel some sympathy with Messrs. William Cory & Son, Ltd., because they seem to have fallen between two stools. At the hearing of the action before BRANSON, J., in which the plaintiffs, Messrs. Dorman Long & Co., Ltd., claimed damages for the injury done to their coffer dam, it was not a matter, presumably, of any great importance whether they made William Cory & Son, Ltd., or Messrs. Cory Lighterage, Ltd., responsible, nor do I imagine at that time that the question as to which of those two companies was liable was considered to be a matter of importance by the two defendants themselves. The learned judge, however, appears to have been invited, at the instance of the defendants, who appeared by the same counsel and solicitors, to regard Elliott, who was the man at the time of the accident in charge of the "Turk," as being the servant of William Cory & Son, Ltd. On that footing the learned judge, accepting that view of the evidence which was presented to him, dismissed the Lighterage company from the action, and judgment was given only against William Cory & Son, Ltd. Had the judgment been given against the Lighterage company, there is no doubt that they could have successfully limited their liability under the Merchant Shipping Act, 1894, s. 503. As I say, judgment was given against William Cory & Son, Ltd., and now they seek to limit their

liability under the section by asserting that they are charterers by demise, otherwise entitled to be regarded as the owners of the "Turk."

The position is, as was pointed out by SLESSER, L.J., as follows. In 1917 the management of the Lighterage company, who at that time were, and still are, as I understand it, the registered owners of the fleet of lighters, which before then had belonged to William Cory & Son, Ltd., was entrusted to William Cory & Son, Ltd. It was done by minute, dated Apr. 17, 1917, which is in the documents that have been placed before us. The effect of William Cory & Son taking over the management of the fleet of lighters was this, that they were put in complete possession of the lighters, though not the registered owners of them, and they had complete control over the working of the lighters; nevertheless they were not the owners. It is true that the word "owner" in sect. 503 includes a person having a limited interest in the ship. What has been held by the House of Lords has now been made clear by a section in the Merchant Shipping Act of 1906; but there is no case and there is no statute which lays down that a person who has no property either at law or in equity in a ship can be regarded as the owner of the ship for the purposes of sect. 503. Therefore in 1917 and the years that succeeded it no one could suggest that William Cory & Son, Ltd., having complete control and possession of this fleet of lighters, were the owners of the fleet.

It is said, however, that in the year 1927, or in the year 1932, I am not sure which, a material change took place, and that as from that date Messrs. William Cory & Son, Ltd., became charterers by demise of the whole fleet of lighters. There is no document which suggests any such change at all. The only document we have had is one dated in 1927, by which it appears that as from that change the Lighterage company ceased to carry on business in their name. Up to that time, William Cory & Son, Ltd., as the agents of the Lighterage company, carried on the Lighterage company's business in the name of the Lighterage company. As from this change in 1927, the business of the Lighterage company was to be carried on in the name of William Cory & Son, Ltd. I think myself that that is the only change which really has ever taken place.

It is, indeed, said by Mr. Carpmael that there was one very important change, that, whereas up to 1927 the Lighterage company were financing the business of running these lighters, from this change the financing was done by William Cory & Son, Ltd. That is just what would happen, having regard to the change in the manner of carrying on the business. While the business was being carried on in the name of the Lighterage company, the receipts under the contract would naturally be paid to the Lighterage company, and they would have funds out of which they could finance the running of the barges; but as from that date all moneys

under the contract would be paid to William Cory & Son, Ltd., who entered into contracts in their own name as though they were principals, and so the running of the barges was financed by William Cory & Son, Ltd. What they did was to recoup themselves out of the receipts from the barges, handing over the profits to the Lighterage company. Notwithstanding an opinion expressed by a witness to the contrary, I am myself satisfied that if in any year the lighterage business had been carried on at a loss, William Cory & Son, Ltd., could have recovered the loss from the Lighterage company. I can myself see no trace of William Cory & Son, Ltd., being turned into charterers by demise. I share the doubts expressed by SLESSER, L.J., as to whether in any case we could properly hold, in the absence of some written agreement, that such a position could be established. It is not necessary to express any final opinion upon that. Nor do I wish to go further into the facts than I have already done. It is sufficient to say that I agree with the conclusion on the facts which has been arrived at by BRANSON, J., and by SLESSER, L.J., and in my opinion this appeal must fail.

FINLAY, J. : I agree so completely with the way in which this matter has been put not only by BRANSON, J., but also by the Lords Justices that I do not think I can usefully add anything.

Solicitors : *William Charles Crocker* (for the plaintiffs) ; *Hair & Co.* (for the respondents).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

R. v. WANDSWORTH LICENSING JUSTICES.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **May 19, 1936.**]

Licensing—Decision of annual general licensing meeting re-opened at adjourned meeting—Further adjournment to meeting not within the month—Licensing (Consolidation) Act, 1910 (c. 24), s. 10—Licensing Act, 1921 (c. 42), ss. 1 and 2—Licensing Rules, 1921, r. 9.

At the general annual licensing meeting held on Feb. 7, the justices decided not to vary the permitted hours. At an adjourned meeting on Mar. 6 the justices announced that they had decided to re-open the question of permitted hours. No business was left outstanding after the latter date. The justices further adjourned the matter of permitted hours to Mar. 20 :—

HELD : the business of fixing the permitted hours having been considered on Feb. 7, it was not new business, and could be adjourned to a date beyond a month from the statutory date, it being impossible for the justices to ascertain the public requirements and to do justice to the application within the month.

[EDITORIAL NOTE.] The enactment that adjourned meetings are to be held within one month from the date of the general annual licensing meeting has been

said to be not merely directory but imperative. It had, however, been previously held that, where a hearing within the statutory period is prevented by the difficulties of the justices themselves, it may be held afterwards; and it is now clear that where the public interest demands an adjournment beyond the period, business begun may be further adjourned beyond the month allowed by statute.

AS TO LICENSING JUSTICES' MEETINGS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 24-27, paras. 55-59; and FOR CASES, see DIGEST, Vol. 30, p. 22, Nos. 139-145.]

Case referred to :

(1) *R. v. Bristol Licensing JJ., Ex p. Whiting* (1903), 67 J.P. 375; 30 Digest 22, 143.

APPLICATION to make absolute a rule *nisi* for a writ of *certiorari* to remove orders of licensing justices into the King's Bench Division to be quashed.

On Feb. 7 the Wandsworth Licensing Justices at their annual general licensing meeting decided not to vary the permitted hours for licensed premises in the district. They adjourned the meeting to Mar. 6 under the provisions of the Licensing Act, 1910, s. 10. At this adjourned meeting the justices announced that they had received a request from the South West London Licensed Victuallers' Trade Protection Association to re-open the matter on the grounds that the licensing justices for the adjoining division of Newington had decided to vary the permitted hours. The justices announced that they would adjourn consideration of the matter to Mar. 20.

The Rev. F. C. Rogers, of Wandsworth, obtained a rule *nisi* on April 2, 1936.

R. M. Montgomery, K.C. and *Christmas Humphreys* for the South West London Licensed Victuallers' Protection Association.

Harold Murphy, K.C., and *Sidney Lamb* for the licensing justices.

F. J. Tucker, K.C., and *H. J. Astell Burt* for the Rev. F. C. Rogers.

R. M. Montgomery, K.C., showing cause : The only question is whether the order made on Mar. 20, more than one month after the annual general meeting began, can be sustained in law. The meeting of Mar. 20 was an adjourned meeting of the annual meeting of Feb. 7, and was in order.

Harold Murphy, K.C., also showing cause : The meeting was adjourned to Mar. 20 so that the public might receive notice of the proposal. The justices were of the opinion that it was in the public interest that the adjournment should be made so that the wishes of the public might be known.

F. J. Tucker, K.C. : The question of permitted hours was decided finally on Feb. 7. It was re-opened on Mar. 6 and adjourned to Mar. 20. It was not a new matter considered for the first time until Mar. 20, and, therefore, outside the statutory month. The justices could not adjourn the matter on Mar. 6 for there was nothing to adjourn.

LORD HEWART, L.C.J. : This is a rule *nisi* for a writ of *certiorari*

to remove into this court a certain order made by the licensing justices for the Wandsworth Division of the County of London at a meeting on or about Mar. 20 last, purporting to vary, pursuant to the Licensing Act, 1921, the permitted hours for the Wandsworth Division.

The rule *nisi* was granted upon three grounds : but one only of those grounds is now persisted in. That is ground No. 1, which is in these terms :

Want of jurisdiction, in that the said order was passed at what purported to be an adjourned general annual licensing meeting not held within one month of the date of the original meeting.

It is a little important in this case to see first of all what the facts are. The reverend gentleman upon whose motion the rule was granted, sets out in his affidavit that on Feb. 7 last these licensing justices "held their general annual licensing meeting at the Battersea Town Hall," and then and there "decided not to vary the permitted hours for the division for the ensuing twelve months"; but that meeting was adjourned to Mar. 6 of this year.

To see what happened on that occasion, I will refer to the affidavit sworn by the justices. After the adjournment to Mar. 6, but before Mar. 6, a letter was received which is exhibited to Mr. Strange's affidavit from the South West London Licensed Victuallers' Trade Protection Association, over the hand of their solicitor. This gentleman wrote that they intended "to apply to the Wandsworth Licensing Justices at their sitting on Friday next"—that is to say, the then ensuing Mar. 6, "to advertise and re-open the question of permitted hours for the Wandsworth Licensing Division." That letter was received, according to the justices' affidavit, on Mar. 3 last; and thereupon the clerk to the justices, Mr. Thomas Baines, "caused a circular letter to be sent to all licensing justices for the said division, directing their attention to the fact that a request had been made for the question of the permitted hours to be re-opened and informing them that on Mar. 6 at their adjourned general annual licensing meeting they would be called upon to decide whether the matter should be re-opened." According to para. 6 of this affidavit :

On Mar. 6 the justices met and considered the desirability of re-opening the question of permitted hours in this division, and decided that in the altered circumstances which then prevailed it was in the public interest that the appropriate means should be taken to ascertain public opinion upon the matter, and so announced our decision in open court and further adjourned the general annual licensing meeting to Mar. 20 for this purpose.

It is said in the affidavit in support of this rule that the whole of the licensing business transacted at the general annual licensing meeting and any adjournment thereof was dealt with at the meetings held on Feb. 7, 1936, and Mar. 6, 1936; and that no business was left outstanding after Mar. 6, 1936. But that is not the view of the facts which

these justices take. According to the affidavit of Mr. Strange, it is not accurate as stated in that paragraph in support of the rule, that no business was left outstanding after Mar. 6, as it was not possible to consider the question of the variation of the permitted hours on that day.

What followed? The statutory notice was duly published; and on Mar. 20 the matter was fully heard. The justices set out in their affidavit the course which they adopted:

We heard in support of the application the representatives of a large number of licensees in our division who appeared to us to be in a position to know what the requirements of the public using licensed houses in the division are and also representatives of the Battersea Chamber of Commerce and the Wandsworth Chamber of Commerce representing a number of traders in the division, and at least three representatives of the opposition. We heard the arguments on both sides fully and at length and gave them careful consideration, and having done so we came to the conclusion that public opinion showed that the public interest would be better served by the permitted hours on week-days being varied from 5 p.m. to 10 p.m. to 5.30 p.m. to 10.30 p.m.

In those circumstances it is said that these justices had no jurisdiction to make the order which they then made; and had no jurisdiction for the reason that this licensing meeting was not held within one month of the date of the original meeting. The sequence of events is perfectly plain. The general annual licensing committee was held on Feb. 7, 1936. A preliminary decision was then reached; but that meeting was adjourned to Mar. 6. On Mar. 6 this document, which Mr. Thomas Baines had duly and very properly given to all the justices, came up for discussion. It is quite true that the rules made under this Act use the word "proposal"—"whether it is intended to consider any proposal to make or vary any order." I am utterly unable to draw a distinction between that which was done here and the making of a proposal. A letter was written by solicitors, who state that they were instructed to apply to the justices to advertise and re-open the question of permitted hours. It went on to say that the position of individual licensees of the Wandsworth Division had become acute, and they used arguments in favour of the course of re-opening the question. If that is not a proposal, I cannot imagine what it is. That proposal was circulated to the justices before Mar. 6. When, therefore, they met at their adjourned meeting on Mar. 6, as to which there is no controversy that it was duly and properly adjourned from Feb. 7, that document was before them. What did they do? Is not it apparent that they proceeded, as far as they could, to consider it? The justices say—and there is not the slightest reason why their word should not be literally accepted—that they met and considered the desirability of re-opening the question of the permitted hours in the division. Nay more, they came to a decision. They decided that in the altered circumstances which then prevailed,

it was in the public interest that the appropriate means should be taken to ascertain public opinion. In other words, having taken this proposal into their consideration, they decided that in order to make that consideration adequate, there must be a further adjournment, and steps should be taken to see what the public really wanted. That being so, it seems to me that what happened on Mar. 20 was a continuation of the consideration which began on Mar. 6.

It is said in support of the rule that the only powers of licensing justices in this matter are to be found in the Licensing Act, 1921, s. 12 (1). That section provides as follows :

The powers of the licensing justices under this part of this Act may be exercised by them, in accordance with such procedure as may be prescribed by rules made by the Secretary of State, at their general annual licensing meeting ;

and by subsect. (2), it is provided that :

An order of licensing justices under this part of this Act,
an order relating to permitted hours,
may be varied by a subsequent order.

On what ground is it said that this adjourned meeting on Mar. 20 was a meeting that had no jurisdiction to deal with this matter ? Our attention has been directed to the case of *R. v. Bristol Licensing Justices* (1), where the court—all three judges agreed—referred to the words in the Licensing Act, 1902, s. 14 : “ And every adjournment thereof shall be held within one month of the date of the general annual licensing meeting,” and said those words must mean “ every adjournment for new business. It therefore cannot be taken after the expiration of the month.” Here we are referred to the Licensing Act of 1902 and the Licensing (Consolidation) Act, 1910. By sect. 10 it is provided that :

(1) For the purpose of granting justices' licences, the licensing justices for every licensing district shall within the first fourteen days of February in every year, hold a special session (to be called the general annual licensing meeting).

(2) The licensing justices shall hold a meeting at least twenty-one days before the general annual licensing meeting, and appoint the day, hour, and place at which the general annual licensing meeting is to be held.

(3) The licensing justices may at any general annual licensing meeting adjourn the meeting to such day and to such place within the licensing district as they think fit for meeting the convenience of persons intending to apply for justices' licences, and a day and place for at least one such adjourned meeting shall be so appointed by the justices.

Passing over a proviso which appears to me to be irrelevant it is provided by subsect. (4) that :

Every such adjourned meeting shall be deemed to be a continuation of the general annual licensing meeting, and shall be held within one month from the date of the

original meeting ; and the first adjourned meeting shall not be held on any one of the five days next after the date of the [adjourned] meeting.

What was it that happened here ? The meeting was originally called on Feb. 7 last. It was then—and so much at least is common ground—adjourned to Mar. 6 last. On Mar. 6, after previous intimation by circulars to all the justices, this proposal on behalf of this Trade Association came up for consideration. It could not be fully and finally dealt with on that occasion ; and accordingly, the licensing justices further adjourned that particular business. It was not new business that was taken into consideration, on Mar. 20. What happened then was that the consideration which had begun on Mar. 6 was continued and completed. It seems to me in those circumstances it is quite idle to contend that there was no jurisdiction in these justices to deal with the matter. They had begun the consideration of this topic on Mar. 6. In order that they might do justice to that topic, and to all parties interested in it, they made a further adjournment, not in order that new business might be entertained, but in order that that business which was already before them might be fully and adequately considered.

In my opinion these justices took a very proper course ; and there is no ground at all for the contention that they either usurped jurisdiction, or acted in excess of jurisdiction ; and, therefore, I think that this rule ought to be discharged.

HUMPHREYS, J. : I am of the same opinion. Mr. Tucker based his argument on the language of the Licensing (Consolidation) Act, 1910, s. 10 (4), which provides that every adjourned annual licensing meeting

shall be deemed to be a continuation of the general annual licensing meeting, and shall be held within one month from the date of the original meeting.

If the matter were *res integra*, that might sound a very difficult argument to answer ; because in this case the annual licensing meeting was held on Feb. 7, and the justices have purported to make an order which can only be made at such a meeting upon Mar. 20. But for a great many years the courts have from time to time been in the habit of pointing out that those words must be read with this limitation : that the general annual licensing meeting and the statutory adjournment which must take place of the general annual licensing meeting and the prohibition against continuing the general annual licensing meeting beyond a month have only relation to new business, and do not apply to further consideration, or consideration by the justices of matters which were properly before them at one of those first two meetings. If it be necessary at the present day to refer to any authority in support of that proposition, in my opinion the judgment of LORD ALVERSTONE, L.C.J., in *R. v.*

Bristol Licensing Justices (1), which has been referred to by my Lord, is conclusive on the matter. LORD ALVERSTONE said :

The words "and every adjournment thereof shall be held within one month of the date of the general annual licensing meeting," must mean every adjournment for new business, which therefore cannot be taken after the expiration of the month.

He went on to say, speaking of course of the facts of that particular case,

But the justices have, in my opinion, power to adjourn specific cases beyond the month where there is not enough time to dispose of them.

Mr. Tucker has then taken this point. He says the cases, and that case among others, show that the only ground upon which a justice can adjourn such cases is that there is no time for the consideration of them. In my view, there is nothing to be found in any case which gives support to that proposition, unless it be that the facts of the particular case are of that nature. No doubt the most general reason for adjourning consideration of cases which have to be dealt with at the general annual licensing meeting beyond the statutory month, is that the justices have no time to complete their list. But I cannot imagine a better reason for justices coming to the conclusion that it is desirable to continue the meeting by adjournment beyond the second hearing, than that which they stated in the sixth paragraph of their affidavit, which has already been read by my Lord, in which the justices state :

In the public interest in the altered circumstances which then prevailed it was in their opinion desirable that the necessary steps should be taken to enable all parties to be before them before they arrived at a final decision upon this question of the alteration [not the extension but the alteration] of permitted hours.

Mr. Tucker's third point, as I understand it, is this. He says the justices in this case were acting beyond their jurisdiction in adjourning from Mar. 6 to Mar. 20 because there was nothing before them which they could adjourn. Again, I have difficulty in following that argument ; and I certainly do not agree with it. I think the matter again is concluded by the language of the justices' affidavit. In that same paragraph, para. 6, the justices state that what happened was this. They had originally met, considered and come to the conclusion that there was no need in the public interest during this year to alter the permitted hours. They then received an application which pointed out some new facts, which were unknown to them, and indeed did not exist at the time that they had met and had come to their original decision. They then had a meeting to consider that proposal in the light of the new facts which it disclosed. They say that they met and considered the desirability of reopening the question of permitted hours. It seems to me that that is a decision by the justices to consider the matter that they are not permitted by the statute and the rules merely to decide on of their own motion.

They can of their own motion say that they will not hear anybody. They are entitled to say that they have come to a conclusion themselves that there is no need to re-open the case. But once they have decided to re-open the case, and to consider the question of alteration of permitted hours, then they are bound to give notices.

The rule made by the Secretary of State which has application to this matter is the Licensing Rules, 1921, r. 4, and is to this effect: "Where it is intended to consider any proposal to vary an order "such as this order," the clerk to the justices shall cause a notice to be published," and so forth. Therefore the justices came to the conclusion that while it was desirable in the public interest to consider the question of altering these permitted hours, they could not do that in accordance with the rules without giving every person an opportunity, by publication in the newspaper, of coming and stating his or her views upon the matter, whatever they might be. That, indeed, is provided for by rule 5, which provides:

Upon the consideration of any [such] proposal . . . the justices shall take such steps as seem to them fit for the purpose of ascertaining local opinion with respect to the matter in hand, and shall allow any person to address them who appears to them to be qualified to give expression to any such opinion.

I think it is not without interest in this matter to observe that the rules are no doubt intentionally drafted in the vaguest possible manner, in order that the justices themselves should be the persons to decide what, in the public interest, is the best course to pursue; but they are not bound in any particular case to take this particular form of procedure and adopt it. They are to consider the public interest, and in the public interest make up their minds what is the fairest way in which to have this raised and put before them, without considering any other point of view. My own opinion is—and I confess I feel no doubt about it at all—that the justices were fully justified in saying, having made up their minds to re-consider this question, the only fair and reasonable course was to adjourn the matter in the public interest. If justices are permitted, as undoubtedly they are permitted, to adjourn consideration of the matter beyond one month from the first day of the general annual licensing meeting, because they think it would be unfair to the parties to sit any longer on the particular day, it seems to me *a fortiori* that they have power to adjourn a matter beyond the statutory month in order to hear all persons who have an interest in this public question—and it is a public question, much more than a consideration of the grant of a single licence—to adjourn in the way in which they have adjourned in this case. I agree with my Lord that the rule ought to be discharged.

DU PARCQ, J.: I have come to the same conclusion as the other members of the court; though not, I confess, without more difficulty

then they have experienced. It would be, I suppose, too much to expect to find in the Act of 1921 a clear statement one way or the other as to whether justices might deal with the question of varying an order of the kind we are dealing with here at some meeting which, for one reason or another, took place more than a month after the general annual licensing meeting. It may well be that, in the light of the decision to which we have referred as to the powers of licensing justices to deal with matters after the expiration of a month in certain circumstances, it was thought unnecessary to say anything expressly about it in the Act of Parliament. However that may be, we have to collect the intention of Parliament from a number of sections. I am impressed by the fact first that the Licensing Act, 1921, s. 12 provides that the powers of justices are to be exercised in accordance with the procedure to be prescribed by rules made by the Secretary of State; and secondly, that subsect. (2) of that section expressly enacts that orders such as the order made on Feb. 7, 1936, may be varied by a subsequent order. It was contemplated therefore, that an order made at the general annual licensing meeting as to the hours at which licensed premises must open and close might be varied—indeed, nobody has suggested in this case that there was not power to vary this order. The rules, to which reference has been made already, require that where it was intended to consider any proposal to vary such order, notices must be given by advertisement in the local newspapers; and if the justices think fit, in such further manner as they may provide. I suppose that the justices might think proper to cause a notice to be given in some manner which might cause even greater delay than the insertion of advertisements in local newspapers.

Taking all these matters into consideration, it seems to me that Parliament must have intended that if a decision is come to at a meeting which is a continuation of the general annual licensing meeting to consider the question of varying an order, the consideration of that question may be continued after the expiration of a month from the date of the general annual licensing meeting. Any other view might well make the power to vary such an order as this, which is expressly conferred, almost nugatory.

I have come to the conclusion that the meeting of Mar. 6 was a continuation of the general annual licensing meeting. Mr. Tucker's argument, which I am bound to say impressed me, was that it was not really the continuation of the general annual licensing meeting—it was not a meeting to consider anything at all. He says what the justices did was to come together on Mar. 6 and say: "We propose to hold a meeting after the period of one month from the date of the general annual licensing meeting has expired, to consider the question, which we cannot consider to-day because the necessary notices have not been given." He relies, of course, upon the words of the Licensing Rules, 1921, r. 4. I think,

however, that when one looks at the substance of the matter, it is not right to say that there was nothing for the justices to consider on Mar. 6. In one sense it is true, and indeed obvious, that they could not consider the proposal; that is to say, they could not hear and determine the issue raised by the proposal. But they could, and they did, consider the proposal in the sense, to use their own words, of considering the desirability of re-opening the question of permitted hours. They considered it, and they came to the conclusion that it was desirable to re-open that question; and thereupon it became necessary for them to decide whether any further notices should be given than those prescribed by the rules; at any rate to see that those notices were given. As I have already said, it would make the provisions for varying an order made at the general annual licensing meeting almost impossible to carry out in many cases, if it were said that they were obliged to say: "We cannot get all this done within the month, and therefore, we cannot discuss the question of varying the order at all." For these reasons, although I acknowledge the strength of Mr. Tucker's argument, and find some difficulty in the words of the Act, a difficulty which, apart from the earlier decisions would have been insuperable, I have come to the conclusion that this rule should be discharged.

Rule discharged with costs.

Solicitors: *Oswald Hanson & Smith* (for the South West London Licensed Victuallers' Protection Association); *Thomas Baines* (Clerk to the Wandsworth Licensing Justices); *Merrimans* (for Rev. F. C. Rogers).

[Reported by H. P. LANSDALE-RUTHVEN, ESQ., Barrister-at-Law.]

MOOR LINE, LIMITED *v.* MANGANEXPORT G.M.B.H.

[KING'S BENCH DIVISION (Branson, J.), May 18, 19, 1936.]

Shipping—Charterparty—Loading—Commencement of laydays.

A charterparty provided that the ship should proceed to her loading port and there load in customary manner in regular turn with other steamers loading ore for the charterers. The time for loading was to count from 6 a.m. after the ship was reported and ready, and in free pratique (whether in berth or not) in accordance with the above provision. Laydays were not to commence before June 10, 1934, unless loading commenced sooner. The steamer arrived at her loading port on June 8, 1934, and was cleared and in free pratique, and notice given of readiness to load on the same day. There was no customary loading berth available until June 18, when in fact the loading began. The question was whether, having regard to the above provisions, the ship's loading laytime began at 6 a.m. after she arrived at the port or not until she came on turn:—

HELD: the ship's loading laytime commenced at 6 a.m. after she arrived at her loading port.

[EDITORIAL NOTE.] This case turns upon a conflict in the clauses of a charterparty naming a particular time for the commencement of the running of laydays and a clause for the steamer to load in regular turn. It was held that a clause dealing specially with the commencement of laydays must override a general reference to loading in regular turn.

AS TO COMMENCEMENT OF LAYDAYS, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 126-128, paras. 210-212; and FOR CASES, see DIGEST, Vol. 41, pp. 568-572, Nos. 3921-3957, and pp. 613, 614, Nos. 4418-4427.]

Case referred to:—

- (1) *United States Shipping Board v. Strick (Frank C.) & Co.*, [1926] A.C. 545; 41 Digest 614, 4423.

SPECIAL CASE stated under the Arbitration Act, 1934, s. 9, asking for the opinion of the court on two questions arising upon the construction of a charterparty.

The respondents were the charterers of the steamship "Eastmoor," flying the British flag, under a charterparty dated Apl. 23, 1934. Pursuant to this charter the "Eastmoor" landed a quantity of ore at Nicolaieff, which she discharged at American ports. The charterparty provided *inter alia*:

(2) The said ship . . . shall . . . proceed to Nicolaieff . . . and there load . . . in the customary manner in regular turn with other steamers loading ore for account of the same charterers . . . a full and complete cargo. . . .

(6) Time for loading to count from 6 a.m. after the ship is reported and ready, and in free pratique (whether in berth or not) in accordance with clause 2. . . . Time between noon Saturday and 7 a.m. Monday not to count unless used, in which case half such time actually used to count.

(10) . . . Laydays are not to commence to count before June 10, 1934, unless loading sooner commenced.

The "Eastmoor" arrived at Nicolaieff on June 8, 1934. She was cleared and in free pratique, and notice of readiness to load was given

on the same day. There was no customary loading berth available for the steamer when she arrived, nor on June 10, the date before which her laydays were not to begin to run, nor until June 18. From June 8 until June 18 she was waiting her usual turn and loading actually began on June 18. A dispute arose between the charterers and the shipowners as to the interpretation of the loading clause in the charterparty. On the version contended for by the charterers they became entitled to £105 5s. 5d. for despatch money, and this was deducted from the freight at the port of discharge. The shipowners on their side contended that no despatch money was due. The parties proceeded to arbitration thereon. In the course of the arbitration the arbitrators were asked to state a special case for the decision of the court, pursuant to the Arbitration Act, 1934, s. 9 (1) (a). The question for the decision of the court was whether, having regard to the provisions in the charterparty, the steamer's loading laytime began (a) at 6 a.m. after she arrived at the port and was in free pratique and ready to load and had given notice of readiness even though she had not reached her berth; or (b) not until she came on turn.

Cyril Miller, for the charterers.

W. L. McNair, for the shipowners.

BRANSON, J.: This case raises a difficult point upon a charterparty, but I do not think I shall get any further light by poring over it. [His Lordship reviewed the facts.] The contention on the part of the shipowners is that the operative clause in question is clause 6, which says:

Time for loading to count from 6 a.m. after the ship is reported and ready and in free pratique (whether in berth or not),

and Mr. McNair says that the reference to clause 2 is necessary in order to show where it is that she is to present herself ready, and provided she gets to Nicolaieff and gives notice that she is really in free pratique, then the time for loading commences. The argument on the other side is that the provision of clause 2 that the ship

shall proceed to Nicolaieff . . . and there load . . . in the customary manner in regular turn with other steamers loading ore for account of the same charterers . . . a full and complete cargo

prohibits the commencement of the time for loading until she has got into turn. The contention of the charterers is therefore that clause 6 must be read subject to the provision of clause 2 as to "regular turn with other steamers loading ore for account of the same charterers."

My duty is to construe this very involved document, and I do not feel that I get much assistance in this case from the cited case of *U.S. Shipping Board v. Frank Strick & Co.* (1). I turn to the document itself and try to give it a consistent meaning. Approaching it in that way,

I look again at clause 2 and upon the face of it impose a duty on the shipowners to go to Nicolaieff as ordered and there load in the customary manner in usual turn with other steamers loading for account of the same charterers, when, where and as soon as ordered by the shippers' agent. Here we are up against words that are either contradictory or tautologous. It is not possible in this particular document to give an operative meaning to all the language used. I think a meaning can be given to the words in accordance with clause 2 without importing into it the further condition precedent that the ship should have come on turn with other ships loading ore for the same charterers.

The main thing which moves my mind in choosing this construction is that one would expect to find the provision that the time for loading should not commence until the ship is on turn, if that was the intention of the parties, in the clause that was dealing with the time at which the ship should commence. Another consideration tends in the same direction. If one looks at clause 2 there is very great latitude given to the charterers, and something would seem to be necessary to protect the shipowner; and it seems to me that a meaning can be given to the inserted words "in regular turn with other steamers loading ore for account of the same charterers" by construing it as a protection to the shipowner, lest by using the liberty given him the shipper might stand back this particular ship in order to give preference to another one.

Those are the reasons which have led me to the conclusion that the question which is put to me by the learned arbitrators should be answered by saying that the vessel's loading laytime commenced at 6 a.m. in alternative (a) in the question.

Solicitors: *Sinclair, Roche & Temperley* (for the charterers); *Constant & Constant* (for the shipowners).

[Reported by FRANK ROWE, Esq., *Barrister-at-Law*.]

DENNIS v. WILLMORE.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parcq, and Singleton, JJ.), May 26, 1936.]

Metropolis—Street trading—Licences—Duration—London County Council (General Powers) Act, 1927 (c. xxii), s. 39.

The respondent sold apples from a barrow in a street within the Metropolitan Borough of Poplar. It was the custom of the Poplar Borough Council to issue one-day licences to street traders, but though the respondent had been issued with several of these licences in the past, he was not in possession of one on the day in question. He was summoned for selling goods from a barrow without a licence contrary to L.C.C. (General Powers) Act, 1927, s. 39. The learned magistrate dismissed the summons on the ground that the borough council having granted a licence, they could dispute its validity; and also upon the ground that the prosecution was instituted to test the system of one-day licences and was not *bona fide* :—

Held: licences could only be granted in accordance with the provisions of the Act, and any licence issued otherwise was invalid. The respondent had not therefore a valid licence and ought to have been convicted.

[EDITORIAL NOTE.] The statutory power in this case is to grant a licence for a year or until it is revoked. It was therefore held that the local authority has no power to grant one-day licences and any such licence is illegal, and the person holding it is in law unlicensed and subject therefore to the statutory penalties.

AS TO STREET TRADING, see HALSBURY, 1st Edn., Vol. 27, Street Traffic, pp. 287, 288, para. 594, and Supp thereto; FOR CASES, see DIGEST SUPP., Highways, Nos. 1435 (a)-(g). and for the London County Council (General Powers) Act 1927 ss. 30-50 see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, pp. 1386-1392].

CASE STATED by the learned magistrate sitting at Old Street Police Court.

The respondent, a street trader, was charged with selling apples from a barrow occupying a stationary position in the carriageway of Roman Road, in the Metropolitan Borough of Poplar. He had no licence on the day in question, though he had been granted a number of one-day licences in the past. The learned magistrate dismissed the summons, holding that (a) the Borough Council had no authority to issue licences except under the L.C.C. (General Powers) Act, 1927, s. 31, which licences, under the provisions of s. 34 of the Act, must be for one year, but that (b) having granted such licences the Borough Council was estopped from questioning the validity of such licences. The learned magistrate came to the conclusion that the proceedings were not *bona fide* instituted to enforce the provisions of the Act, breaches of which were habitually connived at by the Borough Council, but were intended to support the unauthorised system of one-day licences, and he therefore declined to adjudicate upon the complaint. Sect. 34 of the Act enacts :

Every licence granted or renewed under this part of the Act shall, unless revoked, be valid for a period of one year.

R. P. Croom Johnson, K.C., and *H. Glyn-Jones* for the appellant : It is doubtful whether the borough council has power to issue one-day licences but that point is immaterial. A grant of a one-day licence, whether legal or illegal, does not become the grant of a licence for one year merely because it was issued. A one-day licence is not authorised by the Act and is invalid. The respondent had no licence on that day and the learned magistrate should have recorded a conviction.

The respondent was not represented.

LORD HEWART, L.C.J.: This appeal must be allowed. The respondent was charged with selling articles in the street without a licence. The facts stated in the case show that the respondent on Dec. 28 was selling articles without any licence. It is not material whether the learned magistrate dislikes the system of granting one-day licences which has grown up. There was no licence. There was only one course open and that was to find that the respondent had no licence and a conviction must follow. All I say is that the case must be remitted to the magistrate with a direction that the offence has been committed. I find that the offence charged has been proved.

DU PARCQ, J. : I agree. As I understand the argument, it is this. The only power the authority has to grant licences is under the L.C.C. (General Powers), Act, 1927. Sect. 34 provides that all licences must be for one year. On the day of the offence, says the magistrate, the respondent had no licence. Earlier he had had one for one day. The magistrate held that by the Act that licence must be for one year. This piece of paper is not granted under the Act. The borough council has decided to give pieces of paper valid for one day. That document is not a licence under the Act and is therefore invalid and of no value. I agree that the offence has been committed.

SINGLETON, J. : I agree that this case must be remitted to the magistrate with a direction that the offence has been committed.

Solicitors : *C. V. Young & Son* (for the appellant).

[*Reported by H. P. LANSDALE-RUTHVEN, ESQ., Barrister at Law.*]

Observations of BUCKNILL, J., at p. 52] 2 All E.R. 671. *applied.* LOWE v. LOWE. BINNEY v. BINNEY & HILL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **May 5, 1936.**]

Divorce—Discretionary bars—Delay—Culpable delay—Acquiescence.

The parties to a marriage in 1896 separated in 1912 owing to the adultery of the wife. At that time the husband knew he could obtain a divorce and had the means to do so, but the wife preferred that the matter should be kept quiet and he himself was indifferent. From 1914 to 1923 the husband was living in adultery with another woman and now brought this petition asking for the exercise of the discretion of the court:—

HELD: there was culpable delay and a real acquiescence in the adultery and a decree was refused.

[EDITORIAL NOTE. Delay to prevent a decree must be culpable delay. In the present case the husband, by stating that he was “indifferent,” made the decision that the delay was culpable almost inevitable, since it showed that he really acquiesced in the adultery.]

AS TO UNREASONABLE DELAY AS A BAR TO A DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 682-614, paras. 1010-1014; and FOR THE CASES, see DIGEST, Vol. 27, pp. 349, 350, Nos. 3316-3328.]

HUSBAND’S PETITION FOR DIVORCE. In this undefended suit for dissolution in which a husband petitioner asked that the discretion of the court might be exercised in his favour, the court had to consider the effect of a period of twenty-four years’ delay on the part of the petitioner before coming for relief.

Clifford Mortimer for the petitioner.

BUCKNILL, J.: This is a very troublesome case. It is an undefended divorce petition by Mr. Binney for the dissolution of his marriage with Mrs. Binney on the ground of her adultery with a man called Horace Edgar Hill. The difficulty is owing to the conduct of the petitioner himself. The parties were married as long ago as 1896—that is forty years ago—and at the time the petitioner was 24, he is now 64, and his wife was 21, so she is now 61. There were two children of the marriage, born in 1897 and 1898. In 1912, that is twenty-four years ago, Mr. Binney separated from his wife because she had renewed association with the co-respondent Hill, she left him and took the two boys with her, and, so far as the evidence goes, from that date to this Mrs. Binney and Mr. Hill have lived together in adultery, quite happy apparently. They have not had any children, and there is no possibility of Mrs. Binney now having children, and they have not at any time made any suggestion to the petitioner that they would like to have their relationship made regular by his taking the necessary steps to get a divorce.

Now Mr. Binney, who has given his evidence very frankly, said that when his wife left him in 1912 he could have afforded to take proceedings for divorce, he knew he had no difficulty in getting the necessary evidence,

and he threw out several hints to find out whether his wife and Mr. Hill wished a divorce, but they appeared to wish the matter to be kept quiet and as he himself, as he has said, was indifferent—that is his own word—nothing was done, and this illicit relationship continued. Instead of taking divorce proceedings Mr. Binney himself in 1914 started an illicit relationship, I use the word “illicit” as opposed to a lawful state of marriage, with a Mrs. West, and he and she lived together as man and wife for nine years from 1914 to 1923. They then parted and from 1923 to 1934 nothing again was done by Mr. Binney to dissolve his marriage. He told me that he was under the impression that he could not get a divorce then, having regard to his conduct with Mrs. West, but I cannot accept that as an excuse for the delay up to 1934 because Mr. Binney is an educated man and I think ought to know the law. He could very easily have found out, and I have no reason to suppose that he was any more anxious to get a divorce in 1923 and 1934 than he was to get a divorce between 1912 and 1914. In 1934 he met another lady whom he desires to marry. It is not suggested by him that he is living with this lady as his wife at the present time, or that anything immoral has taken place between them. He wishes to marry her, and, wishing to marry her, he took advice from his lawyers and was told that he might be able to get a divorce. In due course he started proceedings, and in due course his wife and Mr. Hill were interviewed by the inquiry agent, and in the course of conversation his wife said that they might as well get married, they would like to die actually man and wife. Those are the material facts in this case.

The question is whether, in the exercise of my judicial discretion I ought to grant a divorce to Mr. Binney. Now the position of the law is this: the Judicature Act, 1925, s. 178 (which merely re-enacts the old law on the subject) states in effect that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or, if in the opinion of the court, he has been guilty of unreasonable delay in presenting or prosecuting the petition. The question which I have to decide is whether in this case there has been unreasonable delay. I understand that to mean a culpable delay, something in the nature of connivance or acquiescence, or something of that sort that on the facts shows the petitioner to have been insensible to the loss of his wife. I assume that the policy of the law in making those discretionary bars is to encourage lawful wedlock, and to set its face against adultery. It makes it more difficult for a petitioner to get a divorce if that petitioner has been guilty of adultery and it makes it more difficult for the petitioner to get his divorce if he has been guilty of culpable delay in bringing these proceedings. In this case, and looking at it from that point of view, the facts show that first of all the wife and the co-respondent have been living in adultery

for twenty-four years and the petitioner has himself been living in adultery over a period which ended in 1923, and was for the duration of nine years so living. In my view that does amount to culpable delay. I think that in effect the petitioner did acquiesce in his wife's adultery, and he took no steps whatever to terminate that, or give them a chance of marrying again or of setting himself free and enabling himself to contract a lawful marriage. I have to exercise a judicial discretion, my own personal sympathy in the matter does not seem to me to be a proper ground on which I ought to exercise my discretion, and the law being as it is, and being satisfied as I am that there has been a culpable delay and a real acquiescence in the adultery I feel it is my duty in this case to refuse a decree, and I therefore dismiss the petition.

Solicitors : *John Carnegie & Mosely* agents for *Hatwell, Pritchett & Co.*, Birmingham (for the petitioner).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

DE LA RUE v. HERNU, PERON & STOCKWELL, LTD.
DE LA RUE, CLAIMANT.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), **April 27 and 28, 1936.**]

Interpleader—Property stored by wife—Claim by husband against warehouse man—Right of warehouseman to interplead—Order directing issue between husband and wife—Jurisdiction to make such order—Married Women's Property Act, 1882 (c. 75), ss. 12, 17—R.S.C. Ord. 57, r. 7.

A wife deposited certain goods for storage with a firm of warehousemen. Her husband, claiming that the goods were his property issued a writ in detinue against the warehousemen for the delivery up of the goods, and obtained an order for an interim injunction restraining them for one month from parting with possession of the goods. The wife threatened to institute proceedings to prevent the warehousemen from delivering the goods to the husband, whereupon the warehousemen took out an interpleader summons and an order was made by the master staying all proceedings in the action of the husband. He further ordered that no action be brought by either the husband or the wife against the warehousemen and that the parties should proceed to the trial of an issue, in which the husband was to be the plaintiff and the wife the defendant, before a master to have the ownership of the goods decided. The wife appealed against the order contending that there was no jurisdiction in an interpleader issue to make a husband the plaintiff and a wife the defendant. The judge in chambers dismissed the appeal. The wife appealed to the Court of Appeal :—

HELD : (i) an interpleader issue is not an action in tort but a proceeding in an action.

(ii) there was jurisdiction under R.S.C. Ord. 57, r. 7, to make the order directing an interpleader issue to be tried with the husband in the position of plaintiff and the wife in the position of defendant.

(iii) the husband would not be a plaintiff in the technical sense of the word, but in the position of a plaintiff as being the claimant who is required to make out his case against the other.

[EDITORIAL NOTE.] The point raised in this case is the technical one, whether an interpleader issue can be directed between husband and wife. It was suggested that a husband cannot sue his wife except under the summary procedure provided in Married Women's Property Act, 1882, s. 17, which section has not been expressly repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935. The court after reviewing the history and nature of interpleader proceedings, were clearly of opinion that such proceedings were not in the nature of an action and, therefore, any provisions respecting actions between husband and wife were inapplicable to the present case.

AS TO THE NATURE OF INTERPLEADER PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 18, p. 596, para. 968; and FOR THE CASES, see DIGEST, Vol. 29, pp. 450, 451, Nos. 1-9. AS TO PROCEEDINGS BETWEEN HUSBAND AND WIFE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 739-741, paras. 1209-1212; and FOR THE CASES, see DIGEST, Vol. 27, pp. 258-260, Nos. 2278-2295. FOR THE MARRIED WOMEN'S PROPERTY ACT, 1882, ss. 12, 17, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, pp. 379, 381.]

Cases referred to :

- (1) *Ex p. Mersey Docks & Harbour Board*, [1899] 1 Q.B. 546; 29 Digest 451, 13.
- (2) *Hamlyn v. Betteley* (1880), 6 Q.B.D. 63; 29 Digest 450, 1.
- (3) *Larner v. Larner*, [1905] 2 K.B. 539; 27 Digest 259, 2286.
- (4) *Webster v. Webster*, [1916] 1 K.B. 714; 27 Digest 260, 2290.

APPEAL from a decision of DU PARCQ, J., in chambers, given on Mar. 20, 1936, dismissing an appeal by Mrs. De La Rue against an order made by Master Baker on Feb. 13, 1936.

Mrs. De La Rue deposited certain furniture, household linen and silver for storage with Hernu, Peron & Stockwell, Ltd., who were warehousemen. Mrs. De La Rue's husband, claiming that the goods so deposited were his property, issued a writ in detinue against the warehousemen for the delivery up of the goods. On Jan. 22, 1936, Mr. De La Rue obtained an order for an interim injunction restraining the warehousemen for one month from parting with possession of the goods. Mrs. De La Rue, claiming that the goods were hers, threatened to institute proceedings against the warehousemen to prevent the delivery up of the goods to her husband. The warehousemen thereupon took out an interpleader summons and on Feb. 13, 1936, an order was made by the master staying all proceedings in the action by Mr. De La Rue against the warehousemen. The master further ordered that no action be brought against the warehousemen by either Mr. or Mrs. De La Rue, and that the parties should proceed to the trial of an issue before a master of the King's Bench Division to determine the ownership of the goods, and that in that issue Mr. De La Rue was to be the plaintiff and Mrs. De La Rue was to be the defendant. Mrs. De La Rue appealed

to the judge in chambers, who dismissed the appeal. Mrs. De La Rue then appealed to the Court of Appeal.

P. B. Morle for Mrs. De La Rue : There is no jurisdiction to make a husband and his wife, plaintiff and defendant in an interpleader issue. There was no machinery prior to the Married Women's Property Act, 1870, for deciding disputes between a husband and wife in their own names as to the ownership of property. By sect. 9 of that Act such questions of ownership were to be decided by a judge, on an originating summons, and by sect. 11 a married woman could maintain an action in her own name in respect of her separate property, but there was no converse provision under which a husband might sue his wife.

The Married Women's Property Act, 1882, s. 12, extended sect. 11 of the Act of 1870 to enable a wife to sue her husband in tort for the protection of her separate property. The procedure open to the husband in the present case is contained in sect. 17 of the Act of 1882, which provides that questions as to property, between a husband and wife, are to be decided in a summary way. That section has not been impliedly repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, inasmuch as sect. 17 was a special provision dealing with a particular subject matter ; and sect. 17 is not among those sections of the Act of 1882 which have been expressly repealed.

Rodger Winn, for Mr. De La Rue : There is jurisdiction to make the order directing the issue as here made. The warehousemen had a right to relief, and it was just and proper that the judge should grant such relief by way of interpleader : *Ex p. Mersey Docks & Harbour Board* (1). An interpleader issue is not an action but a proceeding in an action—*Hamlyn v. Betteley* (2), at p. 65. The incapacity of and limitations upon the husband to sue his wife are only applicable to actions and does not apply here. Sect. 17 of the Act of 1882 is not exclusive. In *Larner v. Larner* (3), it was held that a wife could sue her husband in detinue for the return of her personal property. A husband could not sue his wife for a tort—*Webster v. Webster* (4), at p. 717. To-day under the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman is capable of suing and of being sued, in contract or in tort in all respects as if she were a feme sole.

GREER, L.J. : In this case Mrs. De La Rue deposited certain furniture with a firm called Hernu, Peron & Stockwell, Ltd., warehouse owners, and her husband, Mr. De La Rue, issued a writ against the warehousemen claiming that the property was his, and claiming that the property should be delivered up to him. Undoubtedly he was entitled at common law, and apart from the statute, to bring that action, and to continue it to a conclusion ; and if he could have established his title to the goods, he would then have been, apart from the

interpleader proceedings, entitled to a judgment against the warehousemen; and in the same way, as the law now is, Mrs. De La Rue could also have brought an action against the warehousemen, and either had judgment in her favour or judgment against her.

There was a time when a person in the position of a warehouseman had no means of obtaining relief from that difficult position in which he was placed by two claims being made against him by different persons and he having to decide for himself, without adequate information or means of obtaining it, which of them he should account to for the goods, or, it might be, the money in his possession. It was considered by the legislature that that was putting a person in the position of the defendants in this action, Messrs. Hernu, Peron & Stockwell, in a difficult position, and that it was unjust that they should be without some form of relief; and then by statute relief was given to a defendant so sued, or threatened with claims, by means of interpleader proceedings. The whole object of those proceedings was for the purpose of enabling the warehouseman, or a person in the position of a stakeholder, to get relief, and get it decided as to which of the two claimants he had to account to for the goods or money that he held; and every part of the interpleader proceedings was a part of proceedings intended for the benefit of the warehouseman, the third party, the defendant, who had rival claims made against him. It would have been leaving the relief in an unfortunate position if the interpleader rules, or the interpleader statutes, had not provided for a decision which would enable the defendant in the action, or the person against whom claims were threatened, to know to whom he was to account; and I think Mr. Winn is right in saying that the order on the interpleader issue in the form in which it was made in this case, is not an action but a proceeding in the action against the warehousemen.

The authority for that proposition is the case cited by Mr. Winn. Now, if that is the object of the statute and the rules, it seems to me the court has not got to inquire as to whether one of the claimants is a person who could or could not bring an action for tort against the other claimants. All the court has to determine is whether or not it is necessary, for the purpose of assisting by the means of interpleader, the defendant in the action, to make an order which will enable him to know to whom he has got to account. That is provided for now by rules which were passed under the Judicature Act, 1875, and now authorised under the Supreme Court of Judicature (Consolidation) Act, 1925, and it is not suggested that those rules, or any of them, are *ultra vires*.

The most important of them for the purpose of deciding this case seems to me to be R.S.C. Ord. 57, r. 7, which says:

If the claimants appear in pursuance of the summons, the court or a judge may

order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant.

Now, how does the court determine whether these two people are claimants? Not by considering whether the one can claim against the other, but by considering whether they are two people who are making claims against the defendant in the action; and undoubtedly the husband, Mr. De La Rue, was making a claim which he wanted to enforce by an action against the warehousemen, the defendants. The wife, although she had not issued a writ, had put forward a claim against the warehousemen; and there were therefore before the master in deciding this matter two claimants, one who had actually issued the writ, and the other who had not issued a writ but had put in a claim; and there being two claimants, it seems to me quite clear that there was jurisdiction to make an order under R.S.C. Ord. 57, r. 7, and to decide that an issue should be directed, and also to say which of the two claimants should be, not a plaintiff in the technical sense of the word, because it is not an action, but in the position of a plaintiff; that is to say, who shall be the claimant who has got to make out his case against the other. Quite properly, the learned master decided that the claimant ought to be the husband, because the deposit with the warehousemen had been made by the wife, and she was in the position of a person in possession, having nine-tenths of the law. The other tenth appeared to enable the husband to succeed in the claim.

That, I think, is quite sufficient to dispose of this case. A good deal has been said, and well said, by Mr. Morle, about the Married Women's Property Acts, and he has suggested that by reason of the Married Women's Property Act, 1882, s. 12, and the provisions of the Act of 1935, which keeps alive sect. 12 of the Act of 1882, an order cannot be made in this case as between husband and wife, because that would be an order equivalent to an action by the husband against the wife for a tort.

Now, I think that is entirely wrong, for this reason: that an interpleader order of this kind, an issue directed under the rules, is not an action for tort brought by the husband against the wife; it is a method provided by law for the relief of a defendant who has two claimants making claims against him; and for these reasons, notwithstanding the vigorous and interesting argument we have listened to from Mr. Morle, this appeal is dismissed with costs.

GREENE, L.J.: I agree. The argument for the appellant in this case is, in my judgment, founded upon what is really a misconception

as to the true nature of interpleader proceedings. Interpleader proceedings originated in courts of equity, and the appropriate procedure where a person found himself harassed by claims made on behalf of two or more persons was by way of a bill of interpleader. It is interesting to observe what the nature of that proceeding was. I read a passage from DANIELL'S CHANCERY PRACTICE, 4th Edn., Vol. 2, p. 1418, published in 1867, because it is from this practice in equity that the whole modern law of interpleader is ultimately derived. The learned author says this :

Where two or more persons claim the same thing, by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them.

Then he says, on p. 1419 :

the sole ground on which the jurisdiction of the court, in this case, is supported, is the danger of injury to the plaintiff [the person who exhibits the bill] from the doubtful title of the defendants.

Now, it is to be observed that under the old equitable procedure, the person desiring to interplead exhibits a bill of interpleader, to which he makes both claimants defendants ; and the way the matter then proceeded, under the old equitable procedure, is set out on p. 1422, in these words :

If, at the hearing, the question between the defendants is ripe for decision, the court will make a decree. If that is not the case, proper inquiries, or trials of questions of fact, either before the court itself or a court of common law, will be directed, in order to bring the matter to a determination.

Accordingly, under that practice, there was not necessarily any question of the two claimants suing one another either upon a real or a feigned issue. The plaintiff was the person against whom the claim was made, he came to a court of equity to obtain relief, and to meet the two claimants themselves ; and the matter was then decided, either summarily by the court, or by the usual machinery of directing inquiries, with a consequential order on further consideration ; or by remitting the matter to the courts of law.

I venture to think that it could not be suggested that two defendants to a bill of interpleader of that kind could be said to be engaged in an action of tort against one another. They were not. Before the Interpleader Act, 1831, where the person in possession of the goods was sued at law, his only remedy, apparently, was to exhibit a bill of interpleader in a court of equity, asking, among other things, that the action at law might be stayed pending the decision of the matters raised by the bill ; and the courts of equity had jurisdiction to stay actions at law in those

circumstances. The next step was the passing of the Interpleader Act, 1831, and it is rather important to see exactly what it says. It says this :

Whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expence and delay ; for remedy thereof be it enacted . . .

and then the act proceeds to make provision for the determination of interpleader issues in courts of law, one of the pieces of machinery for the decision of those matters being the directing of a trial on one or more feigned issues.

Now, in substance, the matter appears to be a mere matter of machinery. Both claimants were defendants to the bill, and, under the Interpleader Act, 1831, the machinery could be used of directing a feigned issue, and that is the type of machinery which is embodied in the rules relating to interpleader, contained in R.S.C. Ord. 57 ; but it is machinery, and nothing more, in my opinion.

What, in substance, all along, both under the old equitable procedure and under the modern procedure, is being decided, is claims by two claimants against the person interpleading. What really happens is that whereas there are two claimants who are harassing a person desirous of interpleading, that person is interpleading by the interpleader proceedings calling upon the claimants to come out into the open and formulate their claims against him.

In substance, when an interpleader issue is tried, two actions against the person interpleading are being dealt with, and interpleader proceedings is the method of compelling the parties—either one, or both, or neither of whom may have actually issued a writ—to prosecute their claims. As it is the essence of interpleader proceedings that the person who has interpleaded has no title himself he naturally drops out of the suit. But in effect the entire matter is tried out in the presence of all the parties concerned, and the real claimants are compelled to put forward their claims and have them adjudicated upon. The reason for that is not their own benefit, it is for the relief of the person interpleading.

When it is once appreciated that that is the true nature and history of interpleader proceedings, I take the view that it is quite wrong to treat an issue directed under the interpleader rules as though it were an action of tort. It is a method to enable the court to decide the claims between two persons present at the proceedings, and to decide those claims so that the person interpleading will get the relief to which he is entitled. That being so, I can see nothing in the Married Women's Property Acts which would exclude the operation of the Interpleader

Rules, where the disputed property is the property of husband and wife.

Now, before the right which was given to the wife by the Married Women's Property Acts, the way the married woman could hold her property was either to her separate use, with the intervention of the trustee ; or, where the property was given to her for her separate use without the intervention of the trustee, equity would compel the husband to act as trustee for the wife. Accordingly, before the statutory separate use came into existence, the only way in which a dispute as to the property could arise, where the wife was claiming that the property was hers in equity, was either where her trustees (where there were trustees) were claiming against the husband, or the husband against the trustees ; or where the husband held property in such circumstances that equity would compel him to act as trustee for the wife, and was refusing to recognise her right, in which case the proper procedure would be by a proceeding in equity.

Once the statutory separate use was brought into existence, under the Married Women's Property Acts, it dispensed with the necessity of a trustee. It seems to me that a married woman, in regard to her property, is put in precisely the same position in regard to claims in interpleader, as any other person, and I can see no reason, either in the language of the rules or in the language of the Married Women's Property Acts, for making an exception. The summary procedure under the Married Women's Property Act, 1882, s. 17, is not, in my judgment, the only way to decide these matters between husband and wife, but is a convenient method which can be used in appropriate circumstances. I am quite unable to take the view that it has the effect, impliedly, of writing into the Interpleader Rules some exception in the case of husband and wife. Indeed, when the matter is examined, and the rules are examined, it appears that the argument presented to us on behalf of the appellant really involves this : that the Interpleader Rules do not apply at all in a case where the husband is making a claim against property in the hands of a third person which is also claimed by the wife. I say the argument really leads to this : that the rules would not apply because Mr. Morle, while admitting—and I think he was constrained to admit—that the right of the third person, the warehouseman in this case, to take out a summons calling upon the claimants to appear, under R.S.C. Ord. 57, r. 5, remains to him, was unable to explain, to my satisfaction, at any rate, what relief the applicant could obtain on such a summons.

Mr. Morle said he could get a stay of proceedings under rule 6. With regard to that, I should like to make two observations. I read rule 6, which contains a power to stay proceedings in the action, as meaning this : that, as incidental to the interpleader relief, the court has power to stay proceedings. That, indeed, was the case with regard to a similar

power given by the Interpleader Act, 1831, s. 1. I construe this rule in the same sense.

There is a further objection to the argument, namely, that a mere stay of the proceedings, with nothing more, would not be the granting of interpleader relief at all. The object of interpleader relief is to enable a person who is harassed by claims made by two or more persons, to be quieted. If the passage I have already read from DANIELL'S CHANCERY PRACTICE as to the origin and the nature of interpleader is referred to, that was the object of it. If he is in danger, owing to the doubtful title, he is entitled to be quieted. And that is what the Interpleader Rules are for. A mere stay of the proceedings would not produce this result. It appears to me that if Mr. Morle is right in saying that the only power which the court has in the present case is to stay proceedings, leaving it to the husband to make application under the Married Women's Property Act, 1882, s. 17, the court would not be granting any interpleader relief at all.

For these reasons I think that the appeal fails.

TALBOT, J. : I am of the same opinion, and certainly do not wish to add anything of substance to the judgments which have been delivered. I thought, myself, at a somewhat early stage of the very interesting argument to which we have listened, that the grounds of the appeal were of the most technical character ; and I think that now, at any rate, it has been established by the careful review of the history of interpleader, and the purposes of it, that it is not merely a technical argument, but it is an argument which has no good ground in technicality.

There is here no violation by anybody of the provisions of sect. 12 of the Act of 1882, on which the whole thing rests, namely, that no husband or wife should be entitled to sue the other for tort. The husband in this case does not sue his wife for a tort, and never has ; and that is entirely without expressing any opinion as to the strict technical nature of an action in detinue. In truth, whether you look at the older authorities or the recent authorities, the form of an interpleader issue is quite immaterial. As PARKE, B., said, it might be—and indeed in that particular case ought to have been—in the form in which it entirely ignores any position as between an imaginary plaintiff and an imaginary defendant, or a real plaintiff and a real defendant. The form with which he would have been satisfied in that case would have been simply this : Whether the goods in question there were the property of the trustees or not. The trustees were not trustees in bankruptcy. They were in those days assignees. As he says, that was the real question and it was that, and only that, with which the court was concerned. He makes that more clear, if possible, by saying later that the issue is only a proceeding directed for the purpose of informing the conscience of the court. And I observe that in the last edition of the compilation

known as HALSBURY'S LAWS OF ENGLAND, it is stated in plain terms that the form of the issue is immaterial and is merely directed for the purpose of the information of the court. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Sutton, Ommanney & Oliver* (for Mrs. De La Rue); *Gisborne & Co.* (for Mr. De La Rue).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

Re ANDREWS, *Ex parte* THE OFFICIAL RECEIVER
(TRUSTEE) *v.* STANDARD RANGE AND FOUNDRY CO., LTD.

[CHANCERY DIVISION (Farwell, J.), **May 18, 1936.**]

Bankruptcy—Execution—Withdrawal of sheriff upon agreement to pay instalments—Instalments paid in part—Debtor filing own petition—Receiving order—Claim by trustee to instalments paid—Benefit of execution—Bankruptcy Act (c. 59), 1914, s. 40.

Execution was issued against a debtor, but the sheriff withdrew upon the debtor agreeing to pay the judgment debt by instalments. The debtor paid by instalments £53 lls. 6d., part of the judgment debt. A circular letter was then issued on his behalf calling a meeting of his creditors, and the sheriff re-entered and sold sufficient of the debtor's goods to satisfy the balance of the judgment debt. The debtor thereupon filed his petition in bankruptcy and a receiving order was made. The Official Receiver, who was the trustee in bankruptcy, claimed the sum of £53 lls. 6d. paid under the execution:—

HELD: the sum in question was not the benefit of the execution within the Bankruptcy Act, 1914, s. 40. The creditor could retain it and it was not repayable to the trustee.

[EDITORIAL NOTE.] In this case the learned judge has followed his own decision in *Re Godwin* (2) and the decision of the Divisional Court in *Bankruptcy in Re Samuels* (1). It is understood that the matter is to be tested in the Court of Appeal.

AS TO BENEFIT OF THE EXECUTION, see HALSBURY, *Hailsham Edn.*, Vol. 2, pp. 355, 356, para. 479; and FOR THE CASES, see *DIGEST*, Vol. 5, pp. 808-815, Nos. 6902-6933.]

Cases referred to:

- (1) *Re Samuels, Ex p. Trustee v. Tee*, [1935] Ch. 341; *Digest Supp.*
- (2) *Re Godwin, Ex p. Trustee v. Morris, Re Godwin, Ex p. Trustee v. British Reinforced Concrete Engineering Co.*, [1935] Ch. 213; *Digest Supp.*
- (3) *Re Moon, Ex p. Dawes* (1886), 17 Q.B.D. 275; 4 *Digest* 525, 4794.

SPECIAL CASE stated for the opinion of the High Court under the Bankruptcy Act, 1914, s. 100 (3) from the County Court of Hertfordshire.

On Jan. 17, 1935, the respondents obtained judgment against the debtor for £83 0s. 4d. and issued a writ of *feri facias*. On Jan. 21 execution was levied, and on Jan. 22 the sheriff's officer entered into

possession of the debtor's goods. On Jan. 23 a verbal arrangement was made between the solicitors for the respondents, the debtor and the sheriff's officer, whereby the latter was to withdraw from possession on the following terms: (a) the debtor should pay £25 before withdrawal and monthly instalments of £10 thereafter until the debt and costs were satisfied, (b) upon default the sheriff reserved the right to re-enter. Between Jan. and May various sums were paid, and the sum of £53 11s. 6d. was paid to the creditor on account of the judgment debt.

On May 28 Messrs. Mandley & Sparrow, estate agents, acting for the debtor, issued a circular letter to all the creditors including the respondents, in which they stated that there was a deficiency of assets and called a meeting of all the creditors. On June 6, 1935, the sheriff re-entered, seized the debtor's goods, and sold sufficient thereof to satisfy the remainder of the debt. On June 18 the debtor filed his own petition in bankruptcy, and while the sheriff was holding the proceeds of sale for the necessary 14 days, a receiving order was made. The Official Receiver was the trustee and the sheriff handed to him the balance of the proceeds of sale. The Official Receiver contended that the moneys recovered by execution, viz., £53 11s. 6d., were payable to the Official Receiver as the trustee in bankruptcy.

The special case set out the following three questions for the determination of the court:

(i) whether on the facts stated the moneys paid as aforesaid can be retained as not being the benefit of the execution.

(ii) whether on the facts stated the execution has been completed within the meaning of the Bankruptcy Act, 1914, s. 40, as extended by sect. 41 (1).

(iii) if the answer to the second question is in the negative, whether the Official Receiver as trustee is entitled to the return of the moneys paid.

C. N. Tindale Davis for the Official Receiver.

Anthony Marlowe for the respondents, the Standard Range & Foundry Co., Ltd.

Tindale Davis: There can be no doubt that the circular letter was an act of bankruptcy and that the trustee's title relates back to the date thereof. The trustee claims the moneys paid by the bankrupt as the benefit of the execution, and says that the execution was not completed within sect. 41 (1). The second and third questions do not arise if the answer to the first is against the trustee.

FARWELL, J.: The first question must be answered in the affirmative. The moneys paid are not the benefit of the execution within the meaning of the section. I repeat my own judgment in *Re Samuels* (1) following the decision of the Divisional Court, of which I was a member, in *Re*

Godwin (2). These sums can be retained and are not repayable to the trustee.

Tindale Davis : There will, of course, be an appeal from the decision of this court to the Court of Appeal (*Ex p. Dawes* (3)).

FARWELL, J. : That is of right, and you may then be able to open up questions (ii) and (iii).

Solicitors : *Solicitor to the Board of Trade* (for the Official Receiver) ; *Wallington Fabian & Co.* (for the respondents).

[Reported by CHARLES E. EDEN, Esq., Barrister-at-Law.]

MERSTHAM MANOR, LIMITED v. COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Hilbery, J.), **May 22, 1936.**]

Highways—Dedication—Evidence—Rights of Way Act, 1932 (c. 45), s. 1—Costs—Public Authorities Protection Act, 1893 (c. 61), s. 1 (b).

The public had for forty years used a roadway at Coulsdon and, though there was some evidence of people being stopped or turned away, it was clear that in the majority of cases it had been used as a public highway without challenge. The owner had acquiesced in its inclusion in a town planning scheme as a public highway. No notice had been placed upon the way or served upon the local authority. No fence or gate had been erected to prevent its use before the end of 1934, and it was the removal of a fence or gateway then erected that was complained of in this case as an act of trespass :—

HELD : (i) upon the evidence the roadway had been dedicated and used as a public highway.

(ii) "actually enjoyed by the public as of right" in Rights of Way Act, 1932, s. 1 (1), means actually enjoyed by the public as of right, and that the exercise of such right has been actually suffered by the owner for the period of 20 years.

(iii) "as of right" in the same subsection means in the exercise of a right vested in the public and not by permission of the owner from time to time given.

(iv) "without interruption" in the same subsection means without actual and physical stopping of the enjoyment of the right.

(v) the defendants were entitled under the Public Authorities Protection Act, 1893, s. 1 (b) to costs to be taxed between solicitor and client.

[EDITORIAL NOTE.] The interest in the present case lies in the fact that it is the first case decided upon the question of dedication of a public way since the passing of the Rights of Way Act, 1932. The learned judge deals in detail with the construction of sect. 1 of that Act, and compares it with the similar provisions of the Prescription Act, 1832, and considers how far the authorities decided upon that Act are applicable to the recent statute. The owner had not availed himself of the provisions for giving notice to the local authorities and depositing plans and declarations with them, so that these provisions of the Act could not be considered.

FOR THE DEDICATION OF HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 223-236, paras. 269-285 ; and FOR CASES, see DIGEST, Vol. 26, pp. 293-311, Nos. 245-430. FOR THE RIGHTS OF WAY ACT, 1932, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, p. 191. FOR THE PRESCRIPTION ACT,

1832, see HALSBURY, Hailsham Edn., Vol. 11, pp. 303-309, paras. 549-557, and DIGEST, Vol. 19, pp. 67-75, Nos. 388-449; and HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 5, p. 823.]

Cases referred to :

- (1) *Folkestone Corpn. v. Brockman*, [1914] A.C. 338; 26 Digest 284, 189.
- (2) *Mann v. Brodie* (1885), 10 App. Cas. 378; 26 Digest 281, 177.
- (3) *Poole v. Huskinson* (1843), 11 M. & W. 827; 26 Digest 286, 194.
- (4) *Macpherson v. Scottish Rights of Way & Recreation Society* (1888), 13 App. Cas. 744; 26 Digest 295, 266.
- (5) *Hollins v. Verney* (1884), 13 Q.B.D. 304; 19 Digest 69, 399.
- (6) *Smith v. Baxter*, [1900] 2 Ch. 138; 19 Digest 77, 466.
- (7) *Cooper v. Straker* (1888), 40 Ch. D. 21; 19 Digest 130, 876.
- (8) *De La Warr (Earl) v. Miles* (1881), 17 Ch. D. 535; 11 Digest 10, 78.
- (9) *Flight v. Thomas* (1840), 11 Ad. & El. 688; 19 Digest 129, 864.
- (10) *North Metropolitan Tramways Co. v. London County Council*, [1898] 2 Ch. 145; 38 Digest 131, 966.
- (11) *Bostock v. Ramsey Urban Council*, [1900] 2 Q.B. 616; 38 Digest 131, 964.

ACTION to restrain acts complained of as trespasses committed by the defendants, but intended to determine whether a certain roadway at Coulsdon, Surrey, is a public highway or a private road. The facts are fully referred to in the judgment.

W. Marshall Freeman and *A. W. Nicholls* for the plaintiffs.

Sydney G. Turner, K.C. and *Erschine Simes* for the defendants.

HILBERY, J. : In this case the plaintiffs are the owners of an estate in the parish of Coulsdon, Surrey, which comprises land originally part of a farm known as Woodplace Farm. There runs over this land a roadway beside a piece of woodland known as Three Cornered Shaw. The land over which the roadway runs is situate on the west side of a public highway known as Woodplace Lane, and is bounded on the west by the Southern Railway line from London to Brighton. The question in dispute between the parties is whether this roadway is, as the plaintiffs contend, a private roadway or is, as the defendants contend, a public highway.

The roadway in question is conveniently shown upon the map marked "B" traced from the Ordnance Survey map of 1868. At its southern end the roadway opens on to what is conceded to be a public way leading from the main London and Brighton road up to the Star Inn on the west side of the railway, thence across the Star Bridge over the railway, round a piece of woodland to the south called Petershole Shaw, passing by the south end of this roadway in question and continuing as a foot-path between the south end of the woodland called Three Cornered Shaw, and the north end of the woodland called Petershole Shaw, and thence as a public footway only crossing a field, No. 403, and another field, No. 414, and leading out on to Woodplace Lane at a point almost opposite Woodplace Farm.

The plaintiffs say that the defendants, who are the highway authority for the district in which this roadway is situated, wrongfully claim to use the road in question as a public highway and threaten, and intend to repeat, acts which the plaintiffs say are acts of trespass. The defendants justify those acts, asserting that they are, as they are conceded to be, the highway authority for the district charged by the Local Government Act, 1894, with the duty of protecting all public rights of way within their district and preventing as far as possible the stopping-up or obstruction of any such right of way, and that the roadway in question is a public highway.

The acts of trespass of which the plaintiffs complain are the removal by the defendants of a gate and gate-post at the northern end of the roadway in question, where it opens out on to Woodplace Lane, and a fence at the southern end of the roadway, where it opens on to the footway leading from the Star Bridge along the north side of Petershole Shaw. It is conceded that, if the roadway in question is properly to be considered to be a public highway, the removal of the gate and fence in question by the defendants was an act done by them in pursuance of their duties as the highway authority and was an act which they were required to do by law. The only issue which has therefore to be decided by me is whether the roadway in question is a public highway. In the circumstances it was agreed that the burden of proof was upon the defendants.

The defendants put their case in two ways: First, they contend that the evidence in the case should be held to establish at common law that this roadway is a public highway; secondly, they say that their evidence establishes that this should be deemed to be a roadway dedicated as a public highway under the Rights of Way Act, 1932. There is not, I think, any dispute between the parties as to what the common law requires in order that the defendants may be said to have established that this roadway has become a public highway; nor do I think there is any serious dispute between the parties (except, perhaps, with regard to one matter) about what the law requires if I am to find that this should be deemed to be a public highway under the Rights of Way Act, 1932.

The defendants accept that at common law the burden is upon them to show a long-continued user in such circumstances that an inference should be drawn from it that the owner of the land has intended to dedicate the roadway to the public for their use. From one of the several cases cited to me I take a passage which, I think, as succinctly as possible expresses what the law is. I quote from LORD KINNEAR's speech in the case of *Folkestone Corporation v. Brockman* (1), at p. 352:

The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases, and whether it will import a presumption of grant

or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by LORD BLACKBURN in *Mann v. Brodie* (2). He begins by citing the doctrine laid down by PARKE, B., in *Poole v. Huskinson* (3): "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more." And then he adds more particularly with reference to the effect of user, that "where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner, whoever he was."

As was observed by LORD KINNEAR in his speech in the case I have already cited in dealing with this question from the common law point of view:

The points to be noted are, first, that the thing to be proved is intention to dedicate, and, secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee.

And he goes on at p. 353 to quote with approval this passage from the speech of LORD HALSBURY, L.C., in *Macpherson v. Scottish Rights of Way Recreation Society* (4):

The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public.

In considering the evidence in this case I have applied those principles and borne in mind the further observation to which LORD KINNEAR directs attention, namely, that the question is whether such user as has been proved is to be ascribed to tolerance or right.

In the second place the defendants, as I have said, base their case upon the Rights of Way Act, 1932. They contend that both under sects. 1 and 2 they have satisfied the requirements of the Act. Sect. 1 provides as follows:

(1) Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way. (2) Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.

A consideration of the evidence from the point of view of whether or not it establishes a case for the defendants under the Rights of Way Act, 1932, requires, I think, that I should first decide what it is that that Act requires should be established by evidence before the way shall be deemed to have been dedicated as a highway. Sect. 1 (1), as I have pointed out, enacts that where a way such as is therein referred to, and such as is the one in dispute in this action, has been

actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.

In the first place it is necessary to decide how the words "actually enjoyed by the public as of right" are to be construed. These words, it was pointed out to me, are reproductions of the language used in the Prescription Act, 1832. As used in that Act they have been the subject of judicial interpretation, though I cannot find that they have been the subject of judicial interpretation in their context in the Rights of Way Act, 1932. When considering these words as used in the Prescription Act, LINDLEY, L.J., delivering the judgment of the Court of Appeal in *Hollins v. Verney* (5), at pp. 308, 309, said :

Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land, over which the way is enjoyed ; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it for the same period. Moreover, as the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption. . . . The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury.

That language seems none the less applicable where, as here, the actual user which has to be considered is by members of the public generally and not by some one individual in particular. Moreover, in the Prescription Act the expression is used in connection with a topic very similar to that with which the Rights of Way Act is dealing in sect. 1. I think it is right, therefore, to interpret those words as involving that he who asserts the right must establish as a matter of fact on the one hand the actual enjoyment of the right by the public as of right, and on the other hand the actual suffering of the exercise of that right by the landowner for the full period of twenty years. I take the word "enjoyed" to mean, as STIRLING, J., said in *Smith v. Baxter* (6), at p. 144 [quoting the words of KAY, L.J. in *Cooper v. Straker* (7)], "having had the amenity or advantage of using."

In the second place, what is the meaning of the qualification upon the actual enjoyment by the public expressed in the Act by the words "as of right"? Speaking of the same qualification in the Prescription Act, in *Earl De La Warr v. Miles* (8), at p. 591, BRETT, L.J., said :

The true interpretation of those words "as of right" seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission. If he shews that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing that he had a right to do, whether the lord said "You may do it" or not; he has proved all that it is necessary for him to prove.

It is the requisite quality of the act, not merely the act itself, which is here defined. It is easier for me to appreciate the presence of those words in the Prescription Act, dealing as it does with whether rights have been acquired in respect of one tenement and against another because of acts done over a period by owners of the one tenement, than their presence in the Rights of Way Act, 1932, dealing with the acts of members of the public, no matter how or whence they come, or why they go along the way, and who may individually use the way but once, and that by chance. However, I think it is plain that the words "as of right" require that the quality of the acts, as well as the acts, must be established.

The essential quality of the acts, that is as acts done as of right, has from early days in our law been established by showing that the acts were done openly, not secretly, not by force and not by permission from time to time given. In COKE UPON LITTLETON, p. 113 (b), LORD COKE expresses the requirements thus: "*Longus usus nec per vim, nec clam, nec precario*"; and there is a long line of cases which supports this view. I take from one of them, as I have already cited the case (*Earl De La Warr v. Miles* (8)) a passage which occurs in the judgment of COTTON, L.J., at p. 596, where he says :

You must see whether the acts have been done as of right, that is to say not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done.

I think it right, therefore, to hold that, where the words "as of right" are used in the Rights of Way Act, 1932, in connection with the actual enjoyment, they are satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given.

Finally, there are the words "without interruption" to be interpreted. In the first place, do they refer to the enjoyment of the right or to the period of that enjoyment? Is it sufficient to amount to interruption if acts have from time to time been done which, while not stopping the user from going on, yet challenged the right; or must the interruption,

to come within the meaning of the Act, be actual and physical stoppage of the user for a time or from time to time ?

These words again occur in the Prescription Act. When used in that Act they are qualified by sect. 4 of the Act, which enacts that no act or other matter shall be deemed to be an interruption within the meaning of the statute unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorising the same to be made.

Of the words when used in the Prescription Act, PARKE, B., said in *Flight v. Thomas* (9), at p. 699.

Sect. 4 speaks of the party interrupted. The statute seems to contemplate interruption of the right, not of the period.

But under the Rights of Way Act there is no section equivalent to the Prescription Act, s. 4. The words in sect. 1 are :

has been actually enjoyed by the public as of right and without interruption for a full period of twenty years.

In their context they occur, however, as qualifications of the actual enjoyment of the way by the public, rather than as qualifications of the period. The scheme of the section appears to be that the actual enjoyment of the way must in character be two things, that is, of right and without interruption, and, when an enjoyment of a nature satisfying those two requirements has been proved, the duration of that enjoyment must be shown to have been for a full period of twenty years. Moreover, public user is essentially to some extent intermittent, occurring as it does only when individual members of the public make use of the way. It is, therefore, in my view, as it was in the view of PARKE, B., of the words when used in the Prescription Act, to the interruption of the enjoyment of the way and not to the period of time that the words are attached by way of qualification.

But what must be the nature of the interruption which the enjoyment of the way must be without ? Is it sufficient, as I have said, to amount to an interruption if acts have from time to time been done which, while suffering the actual user to go on, yet challenged the right ; or must the interruption be some physical and actual interruption which prevents the enjoyment of the way ? With regard to this, I can find no help in the rest of the Act, but the words themselves are used in connection with what the Act calls " actual enjoyment " for a period of years. As it is actual enjoyment which must be without interruption, one would suppose that the interruption contemplated must be actual. One can scarcely interrupt acts except by some physical act which stops them. I therefore think that the word " interruption " in the expression in

the Act "without interruption" is properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment. In practice this construction of the words will lead to no difficulty and cause no surprise. Many bodies, such as the four Inns of Court, over and through whose property run roads used by the public, take the precaution to close and actually to stop the public enjoyment of those roads for one day at least in every year.

I pass, therefore, to the consideration of the evidence in order to see whether the requirements of the common law and of the Rights of Way Act have been satisfied. The defendants contend that they have established that this roadway has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, and, indeed, for a full period of forty years, and that there is no sufficient evidence adduced by the plaintiffs that there was no intention during that period to dedicate such way or that during that period of twenty years there was not at any time any person in possession of such land capable of dedicating such way. The defendants proved before me, by the mouth of Mr. Durrant, that this road had been used as early as 1870 and ever since by the public. It is true that he spoke of particular acts of user by persons who were tenants of the farms on the estate, or tenants of houses on the estate, and his evidence was criticised from this point of view; but he made it plain that in his experience the user which he had observed had, during the whole time he had known it (and that is since 1870), been user by persons other than those who were merely tenants and had been by what he called "the public." When he was challenged in cross-examination as to what he meant by the expression "the public," he said: "Me or you or anyone else; I mean anyone," and that he reckoned himself as one of the public, and had regularly used the way as such, openly, not by any particular permission but as a matter of right. He said, and I think he was telling the truth, that he had seen bakers, butchers and grocers all go down that way from Woodplace Farm. Mr. James Mason, whose age was seventy-six, had lived for fifty-three years in the parish of Coulsdon and had used this way himself many times. He said that during the past fifty years not only had he used it himself, but he had seen hundreds using it, especially on Sundays, for walking; and he said that on Sundays in the summer it is a regular walk. He said, like Mr. Durrant, that he had never been stopped by anyone. In cross-examination he mentioned that on one occasion he had seen the road used by a circus proprietor who took his elephants that way.

A most important piece of evidence, in my view, was given by Mr. Wright, who lives at Coulsdon and is an ex-member of the Metropolitan Police. He had been a constable in the force for thirty years, being

posted to Coulsdon on July 6, 1896. From 1896 until 1920 he was the local constable patrolling that part of the Coulsdon district which included this roadway. It was, he told me, part of his duty to patrol all the public highways in his particular area. He told me that he did not go upon private property unless called there or unless he had some reason to suspect that something was going on on that private property which required the interference of a police constable, and he swore that practically every day or night, once during the twenty-four hours, he could guarantee that he had patrolled this road as one of the public highways which it was his duty to patrol. In cross-examination his evidence was challenged because the list of the highways which he was given to patrol was a list set out in a book which gave to the constable the details of each of his beats, and this disputed road had been included in that book, and the constable was unable to produce that book. He was in fact unable to produce it because, as a piece of Government property, it had been rendered up by him to the authorities when he retired. That criticism of his evidence did not detract, in my opinion, from the importance of what he had sworn before me, because he gave his evidence in a way which convinced me that he could have been under no sort of misapprehension as to what he was telling me and that he had no doubt at all in his own mind that this road had been a road which had formed part of his beat as a public highway. He, at any rate once in every twenty-four hours, as a member of the public—true, holding an official position but, none the less, a member of the public—had used this roadway plainly as of right as a public highway during the period between 1896 and 1920, for twenty-four years.

Mr. Rowland, an official of the Surrey County Council employed at the Netherne Hospital, Coulsdon, since March, 1911, told me that, during the twenty-five years he had been in the vicinity of Netherne Hospital, which is, of course, close to this road, he had himself frequently used the road and had seen it used by all classes of persons, pedestrians, local inhabitants, visitors to the countryside, farm carts, tradesmen's vehicles and wheeled traffic of all kinds, such as visiting motor cars and motor cycles. He it was, it is true, as was elicited in cross-examination, who reported to the defendants the erecting of the first fence or gateway across this road, either at the end of 1934 or the beginning of 1935; but I think that that reporting by him of the incident is easily to be understood if the rest of his evidence is true. If it be true, as I think it is, that he had seen that road used in the way in which he says it had been used for all the years he had been in the immediate neighbourhood, it would be natural that he should perhaps be shocked into action when he saw for the first time, after so many years, something in the nature of a barricade against any further user of the sort to which he had been accustomed being put across the road.

Mr. White, who now resides at Coulsdon, said he knew this road before he resided there twenty-five years ago; he had walked upon it and, with his wife, gathered bluebells from beside the road, that he had used it continuously and had used it openly, never being stopped in any way when so doing. He had used it when going to church at Chipstead from his home in order to avoid going along the Brighton Road and because it was pleasanter that way. That evidence, in my view, forms a strong body of evidence that the public has actually enjoyed this way as of right certainly for twenty, and, I think, for forty years.

The plaintiffs called a Mr. Jackson, who, at the age of fifty-nine, said that he remembered the road for the last fifty years. He said he had used the way, but he said he knew he had no right of way because he himself had been turned off and had heard of other people being turned off. More particularly, he remembered that, during the time of Mr. Henton's tenancy of Woodplace Farm and Mr. Baine's occupation of the fields, including those where this road runs, he had known of people being turned off. It turned out that one of the occasions when he spoke of being turned off was when he was nine years of age, and that on that occasion, in fulfilment of a promise which he had received when caught there before, Mr. Henton had given him what he described in his evidence as a "damned good hiding" for trespassing. But it became apparent that he had not on that occasion been keeping to the road but had got through the wood, and, when he was asked in cross-examination what he was doing in the wood, he said: "Trespassing." Listening to his evidence and considering it again since, I do not think it fairly comes to more than this: that, when a boy, he had gone up that road and thereby gained access to the woods and had been turned away by the farmer, and indeed thrashed, for his trespass in the woods. Significantly enough, he admitted that, if he was going from the Star Inn to Woodplace Farm to-morrow, he would go along this road, but he added that he might get stopped for trespassing. Mr. Jackson did not satisfy me that he had been prevented from using this road merely as a road.

Mr. Hallett, who was ninety-two years of age, proved and satisfied me that the repairs to the road had been done by tenants: indeed, the defendants do not assert that they have ever done any repairs to this road in their capacity of highway authority. But Mr. Hallett was also called before me as a witness to prove that he had stopped people from using the road. He had lived at Dean Farm for five and a half years and managed the farm in 1896; that is a farm which adjoins Woodplace Farm. If one looks at the form which the questions and answers took when this witness was being asked about this road being a farm road, it will be seen that they cannot be said to be free from confusion. He spoke about the proper way for the public being to cross Woodplace

Farm, and he said the proper way was "up to Dean Lane for the public, and up by Coulsdon by the main road." He said he repaired this occupation road two or three times and that it belonged to the estate "down to Hooley Farm"; and the rest of the answer which he then went on to give was unintelligible to the shorthand writer and to myself. In the next question he was asked: "What did you say that the occupation road was used for?" and his answer was: "What do you mean by the occupation road?" He was then asked what was this road about which we were talking used for, and he answered, as a question, "Woodplace Road?"; and it became, I think, a matter of great uncertainty as to whether the witness and his questioner at any time were certainly directing their minds and their questions and answers to the same subject-matter. I myself endeavoured to get this matter into the region of certainty by asking him whether he knew the road that runs down from opposite Woodplace Farm by Three Cornered Shaw, and he then answered: "Down to Coulsdon?" in the form of a question. I then said to him: "The one which goes down to Star Bridge," and he replied: "That is the road I am talking about," and that it was that road that he used to repair. I can only say that the witness, who was ninety-two years of age and in many respects a very capable old man, left me with an uncomfortable feeling that perhaps we had not been understanding one another with regard to the subject-matter to which his evidence was intended to be directed. He said he had attempted to stop three people using the road. The question asked him was: "Have you ever attempted to stop people using that road?" and he answered: "Only three people; then they made a mistake; they took the wrong turning and I sent them back; that is all I had to do; they were very pleased to go back." There, again, I received the impression that he was intending to relate an incident when he had sent people back another way because they had taken the wrong turning rather than because they were committing an act of trespass in going that way at all. I can only say that I was unable to derive any assistance from Mr. Hallett's evidence.

The plaintiffs also called a Mr. Osborne, the foreman in charge of the Merstham Estates at the present day, who had discharged the duties of that office for nearly ten years. He said that he had endeavoured to prevent people using this road, and he it was who proved that he erected the fence at the south end of the road on Oct. 12, 1934. In cross-examination this witness admitted that when he was appointed he received no special instructions with regard to this road as distinguished from any other road on the estate, that is to say, no special instructions to prevent trespass or to keep people off this road. His only instructions had been general instructions to keep people off all private roads on the estate and until 1934, when he had orders to erect the fence at the

south end, he had had no particular instructions with regard to this road. He said that it was in pursuance of those general instructions that he had asked people not to use this lane. He said he had never succeeded in stopping anybody whom he had spoken to; that when spoken to they would not stop, they would continue their journey.

That body of evidence satisfies me that there has been an actual enjoyment of this way by the public for twenty years, and indeed for forty years; it satisfies me as well that it has been an enjoyment as of right in the sense in which I have said those words ought to be interpreted. The enjoyment has been open; it is not suggested by the plaintiffs that it has ever been by permission given from time to time. It is true that the plaintiffs do say that all early user is to be attributed to tolerance by the landowner because it was entirely confined to local persons or employees or tenants of the farms, but I am not satisfied that the user was confined to those classes of persons. Certainly during the last twenty years it is clear that the user has been by large numbers of persons, members of the public, not tenants or employees of the estate, and often not even local residents. Certainly none of the evidence on either side suggests that any of the user has been by force. If substantive evidence were required to show that the public believed that in making use of the road it was only exercising a right, it is afforded by the plaintiffs' own witness, Mr. Osborne, as it seems to me, when he makes the admissions to which I have called attention, namely, that, though he told the members of the public when he found them walking upon the road that they must not use the way and that it was considered private, they did not stop, they would not stop, they would continue their journey.

It was shown, as I have said, that the fence at the southern end of the roadway and the gateway at its northern end were erected in or about Oct., 1934, and thereafter removed by the defendants. Until that time no obstruction of the way at any time had been put up either at the southern or northern end of this road by the plaintiffs. If I am right in interpreting the Act as I have done and in thinking, as I do, that the interruption from which the enjoyment of the way must be free is physical and actual interruption, then there can be no doubt upon the evidence before me that this way as from the earliest times and throughout the period of the last forty years has been free from any physical or actual interruption. The plaintiffs certainly failed to prove before me that, during the period of twenty years, there was not at any time any person in possession of the land capable of dedicating or that during the last forty years the title of the land in question had ever been in such a state that the occupier had no power to dedicate; the utmost they showed was that it had been leased again and again to various tenants; on the expiration of one tenancy a fresh lease had

been granted to another tenant, but no evidence was put before me to show for what period there was, on the expiration of any one of the tenancies, occupation by the plaintiffs or their predecessors in title who were at the time the owners of the land. It certainly was never proved before me that the state of the title during the last forty years was ever such that it was impossible that dedication could have taken place.

It was much pressed upon me by the plaintiffs that there had been a complete change in character of the neighbourhood during the last thirty-four or thirty-five years—indeed, since about the beginning of this century—and that I can well understand and, indeed, I think it is proved to be the fact; but I think, in the circumstances of this case, that it tells against the plaintiffs and in favour of the defendants' contention. The estate came to Lord Hilton's family between 1817 and 1821. The earliest estate plan produced, a tracing of which is with the maps produced by the plaintiffs and is marked with the letter "A," already shows the railway and the Star Bridge over it, with the roadway leading across the north end of Petershole Shaw, and then this roadway going up in a northerly direction and coming out on the highway almost opposite Woodplace Farm. That map also shows a footpath leading from the end of Star Bridge across the fields, through Three Cornered Shaw and coming out on the roadway opposite Woodplace Farm. The ordnance map of 1868, reproduced conveniently on the plaintiffs' map "B," shows that that public footpath no longer runs across the meadows from the end of Star Bridge to the footway up through Three Cornered Shaw and then through Three Cornered Shaw; the public footpath by 1868 has apparently come from the end of Star Bridge, round the north end of Petershole Shaw and onwards to the field No. 403 by way of the road between Petershole Shaw and the south end of Three Cornered Shaw, and thence across fields Nos. 403 and 414 on the south side of Three Cornered Shaw and so out to the roadway opposite Woodplace Farm.

The very presence, it was said, of that public footpath, which it is conceded is a public right of way, running as it does from the roadway which comes over Star Bridge on to the roadway opposite Woodplace Farm, makes it most unlikely that there would be a public right of way on the other side of Three Cornered Shaw in the situation of the roadway in dispute, leading also from the roadway on the north side of Petershole Shaw from Star Bridge and coming out also on the roadway opposite Woodplace Farm.

For my own part I think that, as a matter of probabilities, it is probable that, as soon as the footpath ceased to be used across the field actually from Star Bridge to the middle of Three Cornered Shaw and the public were allowed to use as of right, at any rate so much of the roadway from Star Bridge as led to the south end and past the south end of the

roadway now in dispute, they began to use the roadway now in dispute instead of the footpath way over the meadows Nos. 403 and 414. Although the roadway in question was only repaired by the tenants of Woodplace Farm from time to time, it was none the less metalled, and I have no doubt that it was drier to go upon and gave more accommodation than the footpath way over the fields. I am satisfied by the evidence, whether that be the reason for their doing so or not, that the public has for the last forty years actually and continuously used the roadway in question in order to get from Star Bridge or to Star Bridge from Woodplace Lane. The change in character of the neighbourhood has resulted in ever-increasing numbers of the public using this road, when they come to the south end of Three Cornered Shaw, instead of the wetter way over the fields.

I have referred in some detail to the evidence which was given by the plaintiffs, but, when that evidence is read in conjunction with the other evidence which they called, namely, that of Mr. Willoughby and Mr. Stone, I think it is clear that the officials acting for the estate knew that the public was using the road in question.

Is there, then, in the words of sect. 1 (1), sufficient evidence that there was no intention during the last twenty years to dedicate such way ?

If the estate had no intention of allowing the way to be dedicated to the public use, it is a very remarkable thing that, with an ever-increasing user by the public, which is admitted, no obstruction was attempted to be put across the way until the end of 1934.

Mr. Stone, a member of the firm of Messrs. Cluttons, and secretary of the plaintiff company, whose firm had been agents for this estate ever since 1878, except for the years between 1896 and 1916, until the plaintiff company was formed, when Mr. Stone, as a member of that firm, had become the secretary of the company and continued to manage it, told me that he had stopped people walking up that road, and had seen people walking down that road and had told them that there was no public right of way in that piece of road. He said his own personal recollection included most of the time since 1916, and that since 1916 there had been building development and crowds of buses coming and so on, and the matter had been much worse. He had, therefore, as a responsible official managing the estate, ample notice of the user which the public were making of the roadway, and I suppose he would have me to understand from his evidence that he had spoken to people who were walking there and told them it was private, that the estate did not desire that the public should use the road ; but he, too, added that, while it had been the desire of the owners to stop the public from using it, they had never succeeded in doing so. With his experience he must have appreciated that this was strong evidence that the public were using it apparently as of right, yet he did not have any gate or obstruc-

tion put there nor did he have any notice posted at either end of the road. When he was asked why the estate had never, until Oct., 1934, attempted to shut up the way or stop it by gate or fence, he could only say that he did not see any definite reason why they should shut it up, that to shut it up always meant another gate and fence to keep up.

It must be borne in mind, when considering evidence such as that, that Mr. Stone is a gentleman who is thoroughly well acquainted with matters like rights of way and the acquisition of rights of way over estates; he must have known, of course, that there were such things as notices that could be put up, and it does not satisfy me, when a witness is asked about that, that he should say: "But notices get disfigured and may be altered so that the terms of them, through the destruction of a negative, become a positive and make the matter worse." He must have known, since 1932 at any rate, that, under the Rights of Way Act, 1932, s. 1 (3), a notice by the owner of the land over which such a way passes inconsistent with the dedication of the way as a highway placed before or after and maintained after the commencement of that Act in such a manner as to be visible to those using the way was expressly allowed by the Act, in the absence of proof of a contrary intention, to be sufficient evidence to negative the intention to dedicate such a way as a highway. Also, he must have known that that subsection went on to make provision for the case of such a notice being torn down or defaced, and gave him the right, if the notice suffered in that way, to give notice in writing to the council (in this case the defendants) that the way was not dedicated to the public and that such a notice in such circumstances, in the absence of proof of a contrary intention, was, by the Act, allowed as sufficient evidence to negative the intention of the owner of the land to dedicate such way as a public highway. None the less, no such notice was put up. At some date, which has not been fixed in the evidence before me, a finger-post was erected and stood at the south end of this road, one arm of which pointed up this disputed road with the words upon it: "To Farthing Downs." It is clear, I think, from Mr. Willoughby's evidence, that at some time he had seen this finger-post prior to August, 1934, but made no complaint about it and did not mention the matter until Aug. 10, 1934. Mr. Willoughby said that the question of erecting a gate across the Woodplace Lane end of this road was considered with a view to preventing trespass and damage, but at the time the resources of the estate were nearly exhausted by providing gates and fences, and he decided to erect gates in place of existing defective ones before putting up new ones. He went on to tell me that, after the purchase by the Surrey County Council of Netherne Farm in 1899 and of Woodplace Farm in 1902, the Surrey County Council for many years went on building different blocks of buildings and always

had a large number of men at work there, and added very much to the population.

The trespassing became steadily worse. The locality turned into a more suburban area, with continual trespass. The spread of London into and over this area increased the trespass. He was asked : " What did you do to counteract it ? " and he answered : " We erected barbed wire, I think a good deal, and kept up the fences upon the roads as much as possible and endeavoured to keep people to the track wherever we could."

If there was no intention to dedicate this way, it is remarkable that, with the matter so much in mind as this would indicate and with steps being taken against the public elsewhere, no gate or bar was put across this way and not even a notice was put up. It is even more remarkable when one remembers that the estate did take steps, by means of barbed wire and boards, to prevent the public from establishing fresh ways. Mr. Stone said : " First of all, I wish to say that I have not at any time put any wire or obstructions up in any of these recognised-by-us footpaths." I pause to observe that this, though only, it is said, incidentally a footpath, was being much used as such and never had any obstruction or wire put upon it at these times of which Mr. Stone is more particularly speaking. Then Mr. Stone added : " Coming from the point ' A ' to point ' B,' during the last five or six years people have endeavoured to make a track down from ' B ' to ' J ' and one across in the direction of Netherne and one up to ' C,' as I say, coming from the occupation road; and we consequently had barbed-wire fencing put up. People used to come deliberately, evidently armed with cutters. We found it nipped right through. We put boards up to say that it was private, and pointing in the direction of the footpath. I put some wire at one time on the south side of the road at point ' C.' Not until recently did we attempt to put anything across ' C.' " The boards and fences put up did not, he added, relate to the road in question. The estate authorities were therefore actually taking steps to prevent unauthorised user of tracks from the roadway at the south end of the road in question, which the plaintiffs refer to as an occupation road, and yet, while actually taking steps within a few feet of the end of this roadway, where, according to the evidence, there was, as there was elsewhere, increasing trespass, they erected no fence, wire, board or gate across this road but left it in the same condition as the tracks authorised by them for use by the public.

Lastly, in 1923 the defendants prepared a preliminary statement of proposals under the Housing and Town Planning Acts, in which this road appears amongst other roads, streets or ways which it was proposed to stop up or divert as against the provision of the proposed new 40-foot road along the line of the admitted public footpath over the

meadows. On the public inquiry the plaintiffs were heard in evidence but took no point upon this part of the proposal.

In the final town planning scheme of 1928, which was approved by the Minister and given full legal force and effect under the Coulsdon and Purley Town Planning Scheme Order, 1930, this roadway appears in the third schedule under the description of a highway to be diverted or stopped up and is there called "Footpath from Star Bridge to Woodplace Lane." No objection was taken at any stage of these town planning proceedings to the way in which this roadway was being treated, and, while it is of course possible that it might not have been noticed, it is difficult to conceive such an oversight when objections were being made and evidence was being offered on behalf of the estate in connection with the details of the scheme in so far as they affected the estate interests. Moreover, on Feb. 23, 1927, in reference to the proposed scheme, Messrs. Clutton write, on page 1 of the correspondence, to the defendants, saying that they had inspected the maps and found that the estate was affected in two places. They go on to say: "We would also raise no objection to the proposed diversion of the lane to Star Bridge along the line of the public footpath." If the plaintiffs' present contention is right, there could be no question of a "diversion" of the lane to Star Bridge, by which is admittedly meant this roadway now in question. Mr. Stone admitted in cross-examination that the word "diversion" used by a surveyor imported, first, the closing of an old road and, secondly, the substitution of something else for it. If this road was, as the plaintiffs say, a private occupation road, there was no question of the proposed new road being in substitution for it, nor could there be any question of or necessity for closing it. Indeed, unless this road was already a public highway, the language was inapt to express what the parties were then talking about.

In the circumstances I am satisfied that there is not sufficient evidence of an intention not to dedicate; indeed, rather do I think that there has been a long course of conduct by the plaintiffs consistent only with an intention to dedicate.

I am therefore of opinion that the defendants have established their case under the Rights of Way Act, 1932, s. 1 (1), (2).

In the view of the evidence which I have taken, it is not necessary, I think, to discuss the ancient maps, the ordnance maps, the tithe maps and the estate maps, save to say this. The road is shown as a road on the earliest maps put in evidence before me. Rocque's map of 1762, produced from the custody of the British Museum, claims that in it "is expressed all the roads, lanes, churches," etc., and was the earliest in date. It showed the road in question and the shaw alongside which it runs. The road is again shown on the map of 1802 by Faden and again in Greenwood's map of 1822 and 1823; but, of course, these maps

only show it as a road. There is nothing in the maps to show whether or not the topographer-author was intending to represent the roads on his map as public highways. All the ordnance survey maps show the road ; but it was admitted by Mr. Godley, a witness from the Ordnance Survey Department, that they show any road which is there on the surface whether it is a public highway or not. The tithe maps make no distinction between a public and a private road ; their object is to show what is titheable, and the roadways are marked upon them as untitheable parts of the land whether they are public or private. The earliest estate map put in by the plaintiffs shows the road with its northern end opening on to Woodplace Lane opposite the opening of the driftway on to Farthing Down on the east of Woodplace Lane, which is admittedly a public way and bridle track. If this road was a continuation of that public way, it is strange that it was public from Farthing Down to Woodplace Lane and private from the opposite side of Woodplace Lane to Star Bridge. In the map attached to the particulars of sale of this portion of the estate in July, 1929, the plaintiffs printed the name " Woodplace Lane " as though this road was the continuation of that lane leading down to Star Bridge.

I make those comments upon the maps more particularly to call attention to certain details which appear and certain matters which seem to me to be useful to observe ; but, for my part, I do not find that they give me any assistance in arriving at the conclusions to which I have come.

For the reasons given by me, there must be judgment for the defendants, with costs.

Simes : My Lord, my learned friend and I have both looked into the matter, and I think there is no doubt that, if an order is made in our favour as to costs, that naturally carries solicitor and client costs. Strictly, we should get them without its being mentioned in the order. In the case of *North Metropolitan Tramways Company v. London County Council* (10), ROMER, J., said, at p. 148 :

No doubt *prima facie* an order to tax costs means taxation between party and party, and it would be better in cases of the kind now before me to insert expressly in the judgment that the costs are to be taxed as between solicitor and client. But the omission would not deprive the defendant entitled to the benefit of the statute of solicitor and client costs.

HILBERY, J. : Then the court has no discretion in the matter once it is clear that, in substance, judgment has been obtained ?

Simes : That was the view at that time. In *Bostock v. Ramsey Urban District Council* (11), it was held :

The Public Authorities Protection Act, 1893, s. 1 (b), which provides that, wherever in an action within the Act a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client, does not take away

the discretion given to the judge at the trial by R.S.C. Ord. 65, r. 1, to deprive the successful defendant of costs for good cause.

Freeman: My Lord, it is really a penal statute. It is intended to prevent people from inadvisedly bringing an action against local authorities, and the word "shall" deprives your Lordship of all discretion except where good cause can be shown for depriving the defendants of their costs. There is nothing in this case to which I can point which could raise that issue.

HILBERY, J.: Then the order will be for costs as between solicitor and client.

Solicitors: *Westbury Preston & Stavridi* (for the plaintiffs); *Lees & Co.*, agents for *E. C. King*, Purley (for the defendants).

[Reported by LESLIE CARNEGIE, Esq., and GERALD ABRAHAMS, Esq.,
Barristers-at-Law.]

DODWORTH v. DALE.

[KING'S BENCH DIVISION (Lawrence, J.), **May 13, 1936.**]

Income Tax—Personal allowance—Married man—Marriage annulled—Additional assessments—Income Tax Act, 1918 (c. 40), s. 125 (1).

A taxpayer went through the form of marriage with a lady in 1921 and lived with her until 1933. During those years he received in respect of the income tax payable by him the usual personal allowance of a married man. In 1933 he obtained a decree of nullity and the revenue authorities made additional assessments upon him in respect of the years 1928 to 1933 upon the ground that the marriage having been declared null and void he was not entitled to such allowances:—

HELD: the taxpayer having been rightly granted an allowance at the time, it was incompetent for the revenue authorities to make an additional assessment upon him by reason of facts which arose after the year of assessment.

[EDITORIAL NOTE. The question here is quite shortly stated, although its solution required a long and careful consideration of authority. It is simply this: has a decree of nullity of marriage such retrospective effect as to enable the revenue authorities to make these additional assessments upon the male party to the void marriage? Following a line of authorities, the learned judge has held that it has no such effect and does not afford anyone an opportunity of re-opening concluded matters.

AS TO THE EFFECT OF A NULLITY DECREE, see HALSBURY, Hailsham Edn., Vol. 10, p. 641, para. 937; and FOR CASES, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326-2345 and p. 554, No. 6079. AS TO PERSONAL ALLOWANCES, see HALSBURY, Hailsham Edn., Vol. 17, p. 14, para. 19; and FOR CASES, see DIGEST, Vol. 28, pp. 90, 91, Nos. 536-541.]

Cases referred to:

- (1) *Lewis (falsely called Hayward) v. Hayward* (1866), 35 L. J. P. & M. 105; 27 Digest 270, 2382.
- (2) *Norton v. Seton (falsely called Norton)* (1819), 3 Phillim. 147; 27 Digest 266, 2340.

- (3) *A. v. B.* (1868), L.R. 1 P. & D. 559 ; 27 Digest 266, 2334.
- (4) *Elliott v. Gurr* (1812), 2 Phillim. 16 ; 27 Digest 265, 2327.
- (5) *Anstey v. Manners* (1818), Gow, 10 ; 27 Digest 204, 1760.
- (6) *Dormer (orse. Ward) v. Ward*, [1901] P. 20 ; 27 Digest 521, 5629.
- (7) *Corrance v. Corrance & Lowe* (1868), L.R. 1 P. & D. 495 ; 27 Digest 531, 5754.
- (8) *P. v. P.*, [1916] 2 I.R. 400.
- (9) *Turner v. Thompson* (1888), 13 P.D. 37 ; 11 Digest 332, 214.
- (10) *Dunbar v. Dunbar*, [1909] 2 Ch. 639 ; 27 Digest 165, 1339.
- (11) *G. v. M.* (1885), 10 App. Cas. 171 ; 27 Digest 351, 3339.
- (12) *Re Wombwell's Settlement, Clerke v. Menzies*, [1922] 2 Ch. 298 ; 27 Digest 457, 4752.
- (13) *Anderton & Halstead, Ltd., v. Birrell*, [1932] 1 K.B. 271 ; 16 Tax Cas. 200 ; Digest Supp.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the Division of Holborn, in the County of Middlesex, for the opinion of the High Court of Justice.

The facts fully appear from the judgment.

The Solicitor-General (Sir Terence O'Connor, K.C.), Hon. Victor Russell and Reginald P. Hills for the appellant.

Raymond W. Needham, K.C., and Stephen R. Benson for the respondent.

LAWRENCE, J. : In this case I find myself in agreement with the Commissioners. The facts are that the taxpayer was married in the year 1921, or rather went through a form of marriage in the year 1921, and lived with the lady with whom he had gone through the form of marriage until 1933. During those years he claimed and was allowed the married man's allowance. In the year 1933, the respondent brought a suit for nullity of marriage on the ground of the incapacity of his wife, and the decree was passed on Apr. 3, 1933, declaring the marriage null and void by reason of such incapacity. In those circumstances the revenue authorities have made additional assessments upon the respondent in the amount of the allowances which were made to him in the years 1928 to 1933 inclusive. The question that I have to determine is whether those additional assessments were rightly made. That question really depends upon the construction which is to be put upon the Finance Act of 1920, s. 18, which provides :

The claimant, if he proves that for the year of assessment he has his wife living with him, or that his wife is wholly maintained by him during the year of assessment, and that he is not entitled in computing the amount of his income for that year for the purposes of the Income Tax Acts to make any deduction in respect of the sums paid for the maintenance of his wife, shall be entitled to a deduction. . . .

The question of construction which arises upon that section is whether

wholly maintained by him during the years of assessment within the meaning of that section. By the Income Tax Act, 1918, s. 125 (1) :

If the surveyor discovers . . . that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case

the surveyor may make or have made an additional assessment. It is under that section that these additional assessments have been made. Now the reason why the revenue has taken this course is a reliance upon the terms of the decree of nullity and what is said to be the effect of that decree in law. The decree, which is in the form which has been in use for very many years, and certainly for a very long time before the passing of the Matrimonial Causes Act, 1857, declares :

the marriage in fact had been solemnised on Oct. 22, 1921 . . . to have been absolutely null and void to all intents and purposes in the law whatsoever

and that the petitioner

was and is free from all bond of marriage with the said respondent.

It is contended that by virtue of that decree rendering the marriage "null and void to all intents and purposes in the law whatsoever," the decree passed in 1933 made the respondent's *de facto* wife not his wife for the purposes of the Finance Act, 1920, s. 18. The terms of this usual form of decree were considered in the House of Lords in the case of *Lewis v. Hayward* (1) and, as I have said, they have been in force for very many years. Now a large number of authorities have been cited to me by the Solicitor-General on behalf of the Crown, authorities which are not all consistent with each other, some of which are in favour of the view put forward on behalf of the Crown and others which are in favour of the view put forward on behalf of the taxpayer. I think the result of those authorities is that a marriage which is null on the ground of the incapacity of one of the spouses is voidable and not void ; but when void, it is void *ab initio*, but it is not void for all purposes. I think the authorities support that position. The question is whether there is sufficient recognition attached to the *de facto* marriage to justify the court in adopting the interpretation of sect. 18, that the "wife" there referred to includes a *de facto* wife whose marriage is otherwise regular and can only be declared null on the ground of incapacity due to impotence. It has been held that such a marriage will not be declared null except at the instance of the injured party. That was decided in *Norton v. Seton* (2). It has also been decided that such a marriage cannot be declared null and void after the death of the parties. (See *A. v. B.* (3) ; *Elliott v. Gurr* (4).) It has also been held in other cases that time may be a bar to the granting of the decree and that the decree will not be granted if it is asked for on grounds that are not sincere. The question of how

far the marriage is to be regarded as a marriage has been alluded to on several occasions, and on every occasion on which it has been alluded to the learned judges who dealt with the subject have indicated that transactions which have been concluded, things which have been done, during the period of the supposed marriage, cannot be undone or opened up after the marriage has been declared null and void. The first of those cases is the case of *Anstey and Others v. Manners* (5), which was a case as to the liability of a husband for the debts of his wife after a sentence of a decree of nullity had been pronounced. Although in that case the suit which was brought by the person who had supplied the goods to the wife, some of them before the decree and some of them after, was upheld, PARK, J., said this :

A sentence of divorce *ab initio* has been admitted to have been pronounced by the Ecclesiastical Court in June, 1811. From that time, therefore, Mr. Dalrymple ceased to be liable for debts contracted by the defendant.

That implies, in my view, that Mr. Dalrymple was liable for the debts contracted by the defendant during the period of their union. He does not allude expressly to the fact that some of these goods had been supplied during the supposed marriage, but he does go on to say :

If the wife becomes a single woman by operation of law, it is the same as if she had always remained single.

I do not read that sentence as preventing the previous sentence from having its natural meaning. I ought perhaps to have referred before going to the decided cases, to COKE'S THIRD INSTITUTES, ch. XXVII, p. 88 in the edition of 1799, where he said with reference to the offence of polygamy :

Being married. This extendeth to a marriage *de facto*, or voidable by reason of a precontract or of consanguinity, or of affinity, or the like : for it is a marriage in judgment of law until it be avoided, and therefore, though neither marriage be *de jure*, yet they are within this statute.

So that was a statement by Coke that it was a marriage in the judgment of law until it be avoided. Then in *Dormer v. Ward* (6), at pp. 32, 33 and 34, there are some observations which I wish to read from the judgment of VAUGHAN WILLIAMS, L.J., a judgment which was concurred in by the EARL OF HALSBURY, L.C., and A. L. SMITH, L.J. The application there was to the court under the Matrimonial Causes Act, 1859, which is now reproduced in the Judicature Act of 1925. The application there was to vary the terms of ante-nuptial and post-nuptial settlements in a case where there had been a decree of nullity on the ground of impotence of the respondent. It was held :

that, although the marriage had been declared void, and the covenant as to the payment of £200 a year no longer took effect, the court had jurisdiction under the

Matrimonial Causes Act, 1859, on the application of the petitioner, to vary the settlement in respect of that settled property.

On p. 32 VAUGHAN WILLIAMS, L.J., said this :

Now, assuming that the court has jurisdiction under sect. 5 to make orders with reference to the application of the settled property, notwithstanding the fact that the parties to the avoided marriage have never had any child, it still remains to consider the question whether there is in this case any property settled as to which the court can exercise its jurisdiction by making an order with reference to the application of it. Now, generally, no doubt, it is true that the section only gives power to make orders with reference to the application of property settled, and does not give the court power to vary the settlement by treating as settled property which is not settled. But it is obvious that, inasmuch as the section applies to decrees of nullity of marriage, there must, if the section is to apply at all to nullity cases, be a power not only to make orders with reference to the application of property settled amongst the beneficiaries contemplated by the settlement, but also for application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words, the court must read in the settlement child or children as meaning a child or children who are not issue of a marriage, and who are, therefore, illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage which has been avoided. The section says that the court may inquire into the existence of settlements. Existence at what time? I think this means the existence of settlements at the time of pronouncing the decree: *Corrance v. Corrance* (7). Now, I propose to read this settlement in the light of these conclusions. I find that at the time of the pronouncing of the decree a settlement existed between Mr. and Mrs. Ward. I do not find that the settlement continued in force after the decree. In my opinion this settlement did not do so. But I think that the court has power to make orders with reference to the application of the property settled by the settlement in existence at the time of the decree, and I think that, on a motion for an order for the application of property settled, the court, in the case of a decree of nullity, must, for the purpose of the order (if the section is to be applied to cases of nullity at all), read the settlement as if extended and varied so as to make the words "parties whose marriage" connote parties whose marriage was no marriage, and, as must be necessary in a case where the decree of nullity was not based on impotency, "children" and "respective parents" connote illegitimate children and their unmarried father and mother. This is not merely to make an order for the application of "property settled," but to vary the settlement by making those beneficiaries under the settlement who, but for the order of the court, would take no benefit under it. Unless one does this one makes the section a dead letter and of no effect in a nullity case.

He reads a clause from the settlement and says :

Now, in my judgment, the whole of this clause, and indeed the whole settlement, is according to its terms conditional upon a valid marriage taking place, and, although it is true that until the declaration of nullity this marriage was voidable only and not void, and that, therefore, that which has been done under the settlement cannot be undone, I yet think that this covenant in the settlement cannot be enforced after the decree of nullity without an order under sect. 5, and I do not agree with the argument approved by GORELL BARNES, J., that the covenant was either still in force or at an end, and that the petitioner must accept one of these

alternatives, and therefore, could only ask the court to enforce a legal right which has nothing to do with an application under sect. 5.

So VAUGHAN WILLIAMS, L.J., was there saying, with the concurrence of the EARL OF HALSBURY, L.C., and A. L. SMITH, L.J., that that which has been done under a settlement during a *de facto* marriage of this sort cannot be undone. The next case to which I wish to refer is the Irish case of *P. v. P.* (8). That was a case in which, in contemplation of a marriage, £475 had been paid by the wife to the husband as her marriage portion, and it was agreed £400 of that sum should be applied in paying off a charge of that amount on the husband's lands. A marriage then took place, and shortly after the ceremony the husband paid off the charge of £400 out of the £475. There was subsequently a decree of nullity on the ground of the impotence of the husband. The suit was brought by the wife for the £400, or to have a charge upon the lands, and it was held by the Court of Appeal, affirming the decision of the King's Bench that :

the plaintiff was entitled, as upon a consideration that had failed, to be repaid the sum of £400, and was entitled to stand in the place of the chargeant whose charge upon the defendant's lands had been paid off, and that the plaintiff had a good charge on the said lands for this sum of £400.

It was held by the King's Bench Division and not disturbed by the Court of Appeal :

that as regards the sum of £75 paid to and expended by the defendant while the plaintiff lived with him as his wife, this was a concluded transaction which ought not to be disturbed.

On p. 410 MADDEN, J., said this :

The marriage in the present case was not absolutely void, as in the case of a marriage void on the ground of consanguinity. When an essential condition of marriage is absent by reason of the incompetence of one of the parties, the person aggrieved may obtain a decree declaring the form of marriage which was entered into to be null and void. The plaintiff, if she had thought fit "might," in the words of SIR J. HANNEN, "have remained a wife enjoying all the advantages of a wife, save that of marital intercourse": *Turner v. Thompson* (9). But the marriage being voidable at her option, the decree obtained by her is declaratory of the fact that no marriage ever took place. The decree in a case of nullity does not dissolve an existing marriage on the ground of facts which have come into existence after the contract was entered into, such as the adultery of the wife. Power to decree a divorce *a vinculo* on ground such as this was conferred on the English matrimonial court by the statute of 1857. The decree in the present case declares the form of marriage between the parties to be a nullity on the ground of facts existing when it was entered into, and a thing declared to be a nullity cannot constitute valuable consideration for a disposition of property; *ex nihilo nihil fit*. In support of the proposition that a voidable marriage followed by cohabitation can constitute a good consideration for an ante-nuptial disposition of property, Mr. Samuels relies on the cases of *Dunbar v. Dunbar* (10) and *Turner v. Thompson* (9). The former of these cases, *Dunbar v. Dunbar* (10) is a case in which it was held that a completed

and executed transaction effected while the parties live together is unaffected by a subsequent divorce. The husband purchased a house under circumstances which would raise a presumption that it was intended as an advancement for his wife. The wife obtained a divorce in a suit of nullity of marriage. In a suit subsequently instituted by the wife, WARRINGTON, J., held that the doctrine of advancement applied. At the time of the purchase "they were living together, and there was nothing whatever that I can see to lead the court to suppose that the presumed intention in this case was different from the presumed intention in any other cases where a purchase is made in the name of the wife."

He refers to *Turner v. Thompson* (9) and goes on :

These cases are illustrations and applications of the settled principle that things executed and concluded while the parties live together have effect after divorce, and will not be disturbed. They do not assist the defendant's case further than as regards the sum of £75, expended while the parties were living together. They afford no defence as regards the charge of £400, by which the wife's money, paid to the defendant in anticipation of marriage, is now represented.

In the Court of Appeal, SIR IGNATIUS J. O'BRIEN, L.C., said this at p. 423, referring to the decree in use in the case he was referring to :

It carefully describes it as a form of marriage. A form it was, and nothing but a form. As a marriage, from the moment the decree was pronounced it was void *ab initio*.

Then he goes on to cite a passage from the judgment of the EARL OF SELBORNE, L.C., in the case of *G. v. M.* (11) at p. 186 in which he says :

I think I can perceive that the real basis of reasoning which underlies that phraseology is this . . .

that is, the phraseology of sincerity,

that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it ; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence.

That again, I think, in the speech of the EARL OF SELBORNE, L.C., in that case was referring to the basis of the principle as stated by MADDEN, J., that transactions which were concluded during the period of such *de facto* marriage cannot be reopened. At p. 442 MOLONY, L.J., refers to the particular part of the judgment of MADDEN, J., dealing with the £75 which had been paid and expended by the husband during the marriage, and he says :

He held that the latter was a concluded transaction by which both parties benefited, and ought not now to be disturbed, and I think that in this he was perfectly right,

Then there is the case of *Re Wombwell's Settlement* (12), which was a case of a settlement of £25,000. It was held by RUSSELL, J., as he then was, that the settlement of that £25,000 came to an end when the marriage was declared null and void and the settlor was absolutely entitled to the settled funds under the express trust in his favour. But with reference to the interest on that money which had been expended during the course of the *de facto* marriage, no claim arose. At p. 301 in the argument of Mr. Clauson, K.C., it was put in this way :

It is submitted that from and after the decree of nullity the settlement is dead, and it may truly be said that the marriage, a valid and effectual marriage, has never been solemnised. In this case there was no marriage, but merely an irrebuttable presumption of marriage until the decree absolute was pronounced.

RUSSELL, J., having had that argument before him and after referring to the judgment of VAUGHAN WILLIAMS, L.J., in *Dormer v. Ward* (6), said this at p. 306 :

Those expressions show that, in the opinion of the judges of the Court of Appeal, a marriage which has been annulled on the ground of impotence was never a marriage at all, although, no doubt, it is recognised as valid until one of the parties to it takes proceedings to annul it.

Then at p. 308 he says :

The decree of the Divorce Court establishes the fact that there never was a marriage and therefore the settlor is absolutely entitled to the funds comprised in the settlement under and by virtue of the express trust in his favour. It is quite true that no claim could be made by him for the return of the payments made by the trustees during the time when the validity of the marriage was not questioned, for, unless and until the wife intervened, all parties were bound to treat the marriage as valid and effectual.

I do not think it necessary to refer to other authorities. There are, so far as I know, no authorities which doubt the proposition which is laid down in these authorities, namely, that what has been done during the continuance of the *de facto* marriage cannot be undone, cannot be overturned by the operation of law. I therefore consider myself bound by this considerable body of authority to adopt a similar view. But the matter does not rest solely upon the authority of these *dicta*. The matter has also been dealt with by the Matrimonial Causes Act, 1857, ss. 17, 34, which are reproduced in the Supreme Court of Judicature (Consolidation Act), 1925, s. 190 :

The court may if it thinks fit on any decree for nullity of marriage, order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money or annual sum of money for any term not exceeding her life.

Therefore, there the legislature itself is speaking of the husband and wife as husband and wife in a case where there is *ex hypothesi* a decree

of nullity of marriage. The same thing is true of sect. 192 of the Act of 1925, which consolidates the Matrimonial Causes Act, 1859, s. 5, upon which the case of *Dormer v. Ward* (6) was decided. It there provides

The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit.

There again the legislature is speaking of a marriage which has been declared null and void, describing it by the word "marriage." That fact is illustrated very clearly in the case of *Dormer v. Ward* (6), where VAUGHAN WILLIAMS, L.J., refers to the implied changes which he found it necessary to make in the words of the settlement in order to accord with the provisions of that section. Now, in view of these authorities as to the effect which is to be given in law to a marriage which is declared null and void on the ground of impotency, and having regard to the expressions in the statutes of 1857 and 1859, it appears to me that the Finance Act, 1920, s. 18, ought to be read as applying to a wife who is *de facto* a wife living with her husband, one whose marriage has not yet been avoided. There is, however, another difficulty in the way of the Crown. In my opinion it is not lawful for an additional assessment or an original assessment to be made by reference to facts which arise after the year of assessment. In my view that is the reasoning of the decision of ROWLATT, J., in the case of *Anderton v. Birrell* (13). I apprehend that there is no distinction in this matter between an original assessment and an additional assessment under sect. 125. Taking the Income Tax Act, 1918, s. 125, for the purposes of illustration, and because it was the section under which these assessments were made in this case, it seems to me that both the Finance Act, 1920, s. 18, and the other sections of the Income Tax Acts relate to the facts as they exist at the time. The person chargeable was allowed a deduction, and he was rightly allowed a deduction at the time. He proved within the terms of sect. 18 of the Act of 1920 that his wife was living with him, and he was rightly allowed a deduction at that time. In my view it is incompetent to the revenue authorities to make a fresh assessment upon him by reason of facts which are real facts which arose after the year of assessment. The fact to which I refer is the fact that the husband in this case had determined to exercise his option, and had exercised his option to avoid the marriage. That was not a mere declaration of the law; it was a new fact which came into existence which might not have come into existence at all, but which did come into existence in the year 1932 or 1933. In my judgment, the revenue authorities had no power to make an assessment upon the respondent in this case with

reference to the years 1928 and following by reason of facts which came into existence after those years. On both of these grounds, therefore, I am of opinion that this appeal must be dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Ralph Bond, Veitch & Bilney* (for the respondent).

[Reported by LESLIE CARNEGIE, Esq., *Barrister-at-Law*.]

TRINIDAD PETROLEUM DEVELOPMENT COMPANY v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **May 18, 1936.**]

Income Tax—Payable wholly out of profits brought into charge—Losses brought forward greater than net profits for year—Whether brought into charge—Finance Act, 1926 (c. 22), s. 33—All Schedules Rules, r. 19.

Appellant company in the year 1933/34 made a net profit of £69,908, but were entitled to bring forward from the years 1927/28 and 1928/29 losses of £32,085, and it therefore paid no tax in respect of that year. It had paid £46,032 in respect of interest, the payment being made less tax and the revenue authorities claimed the tax retained by the company. It was contended that where accounts are taken according to the income tax requirements and a net profit is shown, such profit is brought into charge although no tax is for other reasons payable:—

HELD: in order that profits may be brought into charge it is necessary that tax be actually paid upon them, and the profits having been set off against losses and no tax paid upon them, the company could not retain the tax deducted from the payment of interest.

[EDITORIAL NOTE. The discussion here is whether the Finance Act, 1926, s. 33, makes profits, which are only profits in an accounting sense, profits brought into charge within All Schedules Rules, r. 19. The argument is that there being profits upon which tax could be assessed but for the fact that by the provisions of the above section certain past losses can be set off against them, these profits are therefore brought into charge. It is clearly laid down, however, that unless tax is actually paid upon the profits in question, these are not brought into charge.

AS TO PROFITS BROUGHT INTO CHARGE, see HALSBURY, *Hailsham Edn.*, Vol. 17, p. 242, para. 489; and FOR THE CASES, see DIGEST, Vol. 28, pp. 73, 74, Nos. 392-397. FOR THE FINANCE ACT, 1926, s. 33, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 672.]

Cases referred to:—

- (1) *London County Council v. A.-G.*, [1901] A.C. 26; 4 Tax Cas. 265; 28 Digest 73, 392.
- (2) *Sugden v. Leeds Corpn.*, [1914] A.C. 483; 6 Tax Cas. 211; 28 Digest 74, 397.
- (3) *A.-G. v. Metropolitan Water Board*, [1928] 1 K.B. 833; 13 Tax Cas. 294; Digest Supp.
- (4) *Luipaard's Vlei Estate & Gold Mining Co., Ltd. v. Inland Revenue Comrs.*, [1930] 1 K.B. 593; 15 Tax Cas. 573; Digest Supp.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts under the Finance Act, 1927, s. 26 and the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice.

Raymond W. Needham, K.C., and *J. S. Scrimgeour*, for the appellants.
The Solicitor-General (Sir Terence J. O'Connor, K.C.) and *Reginald P. Hills*, for the respondents.

LAWRENCE, J. : This case involves the construction of General Rules applicable to all Schedules, r. 19, and the construction of the Finance Act, 1926, s. 33, the point being : What is the meaning in rule 19 of the words "payable wholly out of profits or gains brought into charge to tax" ? The appellant company has been assessed under rule 21 in the sum of £46,032 in respect of interest paid to the British Controlled Oilfields, Ltd., which it is alleged by the Crown was not paid out of profits or gains brought into charge to tax. The company had made losses in years previous to the year 1933/34 and was entitled to carry forward those losses under the Finance Act, 1926, s. 33, and thus, although the company made a net profit after allowance for wear and tear in the year 1933/34 of £69,908, it paid no tax in that year, because it brought forward losses from 1927/28 and 1928/29 of £82,085 which more than absorbed the profit of £69,908. The argument for the appellant company is that the payment of interest to the British Controlled Oilfields of £46,032 was wholly paid out of profits or gains brought into charge to tax because it was paid out of, or is deemed to be paid out of, the £69,908 which were assessed for the year 1933/34 before the deduction of the £82,085, which were deductions for previous losses. The argument which was very ably and ingeniously presented by Mr. Needham, as I understand it, was this. He says that it is the practice, and it is in accordance with the Income Tax Acts, that the amount of the net profits or gains should be assessed in each year, and that that was done in this case, and that £69,908 was the resultant figure. He says that in assessing that figure the revenue authorities did bring those profits into charge to tax. He relies particularly upon the words of the Finance Act, 1926, s. 33, and the contrast which he says exists between them and the words of the Income Tax Act, 1918, sched. D, cases I & II, r. 6 (3) dealing with wear and tear. He says that when dealing with deduction for wear and tear the statute provides in rule 6 (3) :

Where full effect cannot be given to any such deduction in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year, and deemed to be part of that deduction.

The words in that rule upon which he insists are "for the purpose of making the assessment for the following year." So he says the deduction for wear and tear which has to be carried forward has to be carried forward and deducted before the assessment is made, whereas in sect. 33 the scheme is that the deduction should be made after the assessment,

sect. 33 providing that where a person has made a loss in previous years :

he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under sched. D in respect of that trade, profession or vocation for the six following years of assessment.

Therefore he says that the legislature in passing sect. 33 must consciously have used words which were designed to have a different effect from the words used in rule 6 (3) under the Act of 1918, and that the assessment which is made for the year before relief is given for preceding losses is the only thing that can be looked at for the purpose of seeing whether under rule 19 the annual payment has been made out of profits brought into charge to tax. He says, therefore, that the assessment is the only way in which the profits of the year can be brought into charge to tax. In my judgment this argument is unsound and conflicts with the authorities to which my attention has been drawn, namely, *London County Council v. A.-G.* (1), at p. 297 ; *Sugden's case* (2), pp. 253 and 264 ; the *Metropolitan Water Board case* (3) ; and the *Luipaard's Vlei Estate case* (4), at pp. 581 and 592. All the learned judges in those cases speak of " profits brought into charge to tax " as being profits which have suffered tax, profits out of which or in respect of which tax has actually been paid, or for which there has been a liability to tax created. Mr. Needham submits that those cases were all decided before sect. 33, and that, therefore, the observations made in them ought not to be held in any way to conclude the question ; but apart from those cases, I am of opinion that the words of rule 19 are not coterminous with the word " assessed " in sect. 33. They appear to me upon their ordinary interpretation to refer to profits which have actually suffered tax or in respect of which a liability to tax has been created. As I understood him, Mr. Needham agreed that in respect of other forms of relief from income tax there might be relief which, in accordance with the framework of the Income Tax Acts was allowed after the assessment for the year had been made, and in such circumstances it seems to me it would be impossible to treat the assessment which precedes the relief as settling the amount of the profits brought into charge to tax within the meaning of rule 19. The net figure which creates the taxable income must, in my opinion, be the amount of the profits brought into charge to tax. For these reasons I am of opinion that the judgment of the commissioners was right, and the appeal will be dismissed with costs.

Solicitors : *Elvy Robb & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

**WILSON BOX (FOREIGN RIGHTS), LTD. (IN LIQUIDATION)
v. BRICE (INSPECTOR OF TAXES)**

[KING'S BENCH DIVISION (Lawrence, J.), **May 19, 1936.**]

Income Tax—Trading profit—Sale of patent rights—Sale in course of liquidation of company.

The appellant company was formed in 1933 with a capital of £2,500 and was formed for and did in fact purchase the foreign right in a patent for £2,500 payable in the shares of the company. Subsequently all the holders of the shares agreed to sell those rights to two gentlemen for £50,000. This agreement was the subject of litigation and in settlement thereof the following agreement was made. It was agreed that the previous agreement should be annulled and that the company should go into voluntary liquidation and the liquidator should sell the Belgian, French and Italian rights in the patent to the purchasers for £20,000. This agreement was implemented and the £20,000 purchase money was distributed among the shareholders according to their respective shareholdings and treated as part of the distribution of the assets of the company in the liquidation. The revenue authorities claimed that such sale of rights for £20,000 was a trading transaction, the profit of which was assessable to income tax:—

HELD: the company had realised the asset in question by going in voluntary liquidation, and the mere liquidation of the assets of the company and the profit on the transaction was not assessable to income tax.

[EDITORIAL NOTE. There have been several cases where the sale of assets have been treated as a trading transaction and the profit made thereon assessed to income tax. The present case distinguishes these in two separate ways. First, it distinguishes those transactions which were carried out where there was no liquidation of the company. Secondly, where there was a liquidation, it distinguishes those cases where the liquidator was in fact carrying on the business of the company and not, as here, merely realising the assets of the company for distribution. It must be noted that the contract in existence before the liquidation was annulled, and the contract actually carried out was a new one made by the liquidator himself, but which, it had been previously agreed, should be made by him.

AS TO WHAT ARE PROFITS OF A TRADE, see HALSBURY, Hailsham Edn., Vol. 17, p. 118, para. 223, and FOR CASES, see DIGEST, Vol. 28, pp. 18-21, Nos. 92-107 and Supp.]

Cases referred to:—

- (1) *Californian Copper Syndicate, Ltd. v. Harris (Surveyor of Taxes)* (1905), 5 Tax Cas. 159; 28 Digest 23, Case (b).
- (2) *Inland Revenue v. Oban Distillery Co. Liquidator*, [1933] S. C. 44; 18 Tax Cas. 33; Digest Supp.
- (3) *Re Beni-Felkai Mining Co., Ltd.*, [1934] Ch. 406; 18 Tax Cas. 632; Digest Supp.
- (4) *Ducker v. Rees Roturbo Development Syndicate, Inland Revenue Comrs. v. Rees Roturbo Development Syndicate*, [1928] A.C. 132; 13 Tax Cas. 366; Digest Supp.
- (5) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K.B. 403; 12 Tax Cas. 358; 42 Digest 666, 765.

CASE STATED under the Income Tax Act, 1918, s. 149, by the

Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

J. S. Scrimgeour for the appellants.

The Solicitor-General (Sir Terence J. O'Connor, K.C.) and Reginald P. Hills for the respondent.

LAWRENCE, J. : In this case the question that I have to decide is whether there was any evidence upon which the commissioners could find that the £20,000 which was in question in this case was a trading transaction, the profit of which was assessable to income tax. The facts are somewhat unusual. The appellant company acquired the foreign patent rights in Mr. Wilson's patents for improved epicyclic gears in motors from Improved Gears, Limited. They acquired those rights in the year 1933, being formed with a capital of £2,500, and on July 21, 1933, the appellant company, having been formed with that capital, entered into this agreement for the purchase of these foreign rights in consideration of the sum of £2,500 which was to be paid in shares. Subsequently an agreement was entered into by the holders of all the shares in the appellant company to sell their shares to a Mr. Leigh and a Major Lago for £50,000. In pursuance of that agreement Mr. Leigh and Major Lago paid £2,500 by way of deposit, and further sums amounting in all to £11,000, but then refused to complete the transaction. An action was then begun by the vendors under that agreement, that is to say, the shareholders in the appellant company, for specific performance, or in the alternative, rescission and forfeiture of the deposit. This action was settled upon the terms of a letter of Nov. 2, 1934, under which the agreement for the sale of shares was cancelled, the appellant company which was, of course, controlled by the vendors who held all the shares in it was put into liquidation, and the liquidator was authorised to sell to Mr. Leigh and Major Lago the Belgian, French and Italian patent rights for the sum of £20,000 ; that is to say, a part of the patent rights which the vendors under the previous agreement had agreed to sell to Mr. Leigh and Major Lago for £50,000. The settlement was implemented by a resolution of the appellant company providing that the company should be wound up, that a liquidator should be appointed, and authorised to sell to Mr. Leigh and Major Lago the Belgian, French and Italian patents for £20,000, such purchase money to be distributed amongst the shareholders according to their respective shareholding and to be treated as part distribution of the assets in the liquidation of the company, that the liquidator should be authorised to transfer or cause to be transferred to Self-Changing Gear Trading Company, Limited, the remaining foreign patents and patent rights, and other assets of the company for such consideration in shares as might be determined by the shareholders of

the appellant company, and that such shares should be distributed amongst them and treated as a further distribution of the assets in the liquidation of the company. That resolution was carried out, and the letter had provided that £13,500 which was in the hands of the shareholders of the appellant company should be treated as part of the purchase price of these patent rights, and should be distributed by the liquidator as part of the £20,000. It is upon that £20,000 that the inland revenue authorities claim income tax. The finding of the commissioners is expressed in the following words :

We held, firstly, that the trade of the appellant company included dealing in patent rights and inventions and that the proceeds of sale of the rights in question were trading receipts received by the liquidator in the course of trading ; and, secondly, that the amount of such trading receipts comprised not only the sum of £6,500, but also the sum of £13,500 previously paid by the purchasers under the agreement for sale of the shares of the appellant company.

Now the argument of the Solicitor-General is that there was evidence upon which the commissioners could find that the £20,000 was received in the course of trade carried on by the company in the name of the liquidator or, I think, by the liquidator in the name of the company. The evidence to which he alluded was first that the company had bought the patent rights for £2,500 in order to sell them for £50,000 ; secondly, that in fact some of the rights were sold for £20,000, and that was the only known transaction which the company entered into ; that the company by its memorandum of association had as its objects the acquisition and sale of patent rights, the object of selling the whole or part of its undertaking, and other similar powers ; that the sale of these patent rights to Mr. Leigh and Major Lago for £20,000 was decided upon before the liquidation, and that the remaining rights of the company were sold to another company, the company I have already named. He relied upon a number of cases which I will refer to in a moment. In my opinion the evidence to which the Solicitor-General has referred is not evidence which goes to show that the liquidator was carrying on trade either for himself or on behalf of the company in realising the assets of the appellant company. I can see no way in which he could have realised these assets more expeditiously or more as a matter of the mere liquidation of the assets of the company than he did. It is, I think, clear, and was accepted as clear by the Solicitor-General in his argument that the liquidator of a company may realise the assets of a company without carrying on the business of the company in such a way as to attract income tax, and on the other hand, a liquidator of a company may realise the assets of a company in such a way as to involve the carrying on of a trade, the profits of which are assessable to income tax. But in this case in my opinion there is no evidence that the liquidator did carry on the trade of this company in such a way as to

attract income tax. It is perfectly true that if the sale of these patent rights had been effected by the appellant company without the appellant company going into liquidation, such a sale might, and probably would have attracted income tax because of the object and powers of the appellant company. But it does not follow from that, in my opinion, that the sale of those assets in the course of liquidation necessarily involved the carrying on of the trade of the company by the liquidator or by the company. Then it is argued that the fact that the plan had been settled upon beforehand had some effect upon what the liquidator did afterwards for the purposes of income tax ; but in my opinion there is no substance in that argument. In every case of a voluntary liquidation the fact of liquidation must be settled upon beforehand, and the fact that the shareholders in a company decide to go into liquidation, and that a liquidator shall liquidate the assets in a certain way, has no effect upon the question whether that way of liquidating the assets attracts tax. The only question is : How were the assets liquidated ? did that form of liquidation involve the carrying on of a trade by the liquidator or by the company ? No authority was cited to me which indicates that if a company is formed for the purpose of exploiting a certain asset and chooses to go into voluntary liquidation for the purpose of the realisation of that asset, and realises that asset by a mere liquidation of the company's assets, that that attracts tax any more than the mere liquidation of any other company's assets. The cases which were cited by the Solicitor-General appear to me to have no conclusive bearing upon the present case. The first case was the *Californian Copper Syndicate* (1). That was a case in which a mining company sold its mining property for shares in another company, and it was held that it was assessable on the profit which it had made, these shares being valuable shares. But in that case there was no question of liquidation, and the case, therefore, is not helpful to me. The *Oban Distillery Co.* case (2) was a case where the company had been in the habit of letting out storage in warehouses to be paid for when the goods were withdrawn from those warehouses. The company went into liquidation, and the liquidator collected from the persons who had used these storage facilities certain sums which they were not bound to pay but which had accrued due up to the date of the liquidation, and it was held that the company was taxable in respect of those sums. But these were profits which were derived from a trade which was undoubtedly carried on by the company before liquidation. In connection with that case the Solicitor-General drew my attention to the fact that it is not always that the assets of the company are vested in the liquidator ; and that again has no important bearing in my opinion upon the question which I have to determine, which is whether there was any evidence that the liquidator here, whether on his own

part or on behalf of the company—and he always carries on business on behalf of the company—was in fact carrying on the trade of the company. The next case was *Re Beni-Felkai Mining Company, Limited* (3). That was a case in which a British company carrying on business in Algeria went into liquidation—it was a mining business and a railway business—and the company's business was carried on as a trade by the liquidator for several years. The question was whether his remuneration as liquidator should be paid in priority to the tax. The *Rees Roturbo Development Syndicate* case (4) was another case of a profit arising from the sale of patents which were held to attract tax by the commissioners, and that finding was adopted by the court above. Again there was no liquidation. The *Cape Brandy Syndicate* case (5) was a case again where there was no liquidation. It was a case in which a syndicate was formed of members of the wine trade for the purpose of buying a large quantity of brandy and re-selling it over a period of years, and re-selling it not by themselves, but re-selling it through their own wine firms as their agents, and that was held by the commissioners to constitute a trade. There again there was no liquidation. For those reasons I am of opinion that the appeal in this case must be allowed.

Solicitors : *Johnson, Weatherall, Sturt & Hardy* (for the appellants) ;
Solicitor of Inland Revenue (for the respondent).

[Reported by LESLIE CARNEGIE, Esq., Barrister-at-Law.]

BERG v. SADLER & MOORE.

[KING'S BENCH DIVISION (Macnaghten, J.), May 18, 1936.]

Sale of Goods—"Price maintained" goods—"Stop list"—Attempted purchase by person on stop list—Purchase money paid—Refusal to deliver—Recovery of price—Illegality.

Both the plaintiff and the defendants had entered into a price maintenance agreement with the Tobacco Trade Association. The plaintiff owing to alleged breaches thereof had been placed upon the stop list. By means of third parties he attempted to obtain a supply of goods included in the agreement from the defendants and £72 19s. was in fact paid to the defendants as the price of the goods. They then suspected that the purchase was on behalf of a party who ought not to be supplied and refused either to supply the goods or to return the money:—

HELD: (i) the plaintiff had attempted to obtain goods by false pretences and could not maintain an action for the money paid.

(ii) the case was a proper one for costs on the High Court scale, although defendants had opposed an application to remit it to the county court.

[EDITORIAL NOTE. It is probably unusual for a prosecution to be brought upon a misrepresentation made in the course of a bargain and the more general course is for the person deceived to proceed for damages in a civil action. There is clear authority, however, that in the case of a false pretence made in the course of a bargain, an indictment will lie. It will be noted that the defence relied upon the

fact that the money was not received from the plaintiff or as paid upon his behalf, but as paid upon behalf of Reece, the person whose name was used for the purposes of the transaction.

AS TO FALSE PRETENCES ARISING FROM CONTRACT, see HALSBURY, Hailsham Edn., Vol. 9, p. 567, para. 960, and FOR THE CASES, see DIGEST, Vol. 15, pp. 987, 988, Nos. 11,051-11,057.]

Case referred to :

(1) *Re London & Globe Finance Corpn., Ltd.*, [1903] 1 Ch. 728 ; 15 Digest 940, 10,354.

ACTION for money had and received to recover the purchase price paid for goods of which delivery was refused.

The facts fully appear in the judgment.

H. Glyn-Jones for the plaintiff : The money paid was not paid as money to further the unlawful purpose, but merely as the purchase price of the goods.

B. L. A. O'Malley for the defendants : There is no case to answer. The claim fails as the money was paid over on behalf of Reece.

MACNAGHTEN, J. : In this action Mr. Max Berg, who carries on the business of a retailer of tobacco and cigarettes, and also that of a hair-dresser, at 229, High Street, Shoreditch, in the County of London, sues Messrs. Sadler & Moore, who carry on business as dealers in tobacco at 20, Spital Square in the same county. He sues them to recover a sum of £72 19s. 0d., which he had paid to them in the following circumstances :

Mr. Berg entered into an agreement with a body, described as the Tobacco Trade Association, whereby he agreed that if he was supplied with tobacco and cigarettes manufactured by certain people, he would only supply the goods so bought by him to the classes of people named in the second clause of the agreement, and it was provided that if he broke that agreement, then he could be placed on what is described as the " Stop List," which meant that no person manufacturing tobacco of that description and class, or no person dealing in tobacco or cigarettes of that class, could be at liberty to supply him with the goods, the object of that agreement, I understand, being, with regard to what are called " price maintained " goods, to secure that all retailers of such goods should charge a uniform price to the public for the goods. Mr. Berg, the plaintiff, signed that agreement on Nov. 6, 1933. It is apparently alleged against him that he committed the breach of clause 2 of the agreement, and in consequence of that he was placed upon the " Stop List." Messrs. Sadler & Moore, the defendants, to the knowledge of the plaintiff had also entered into a contract with the Tobacco Trade Association, and pursuant to the provisions of that agreement they were precluded from supplying Mr. Berg with tobacco or cigarettes.

It appears that Mr. Berg had been able to obtain cigarettes which

were "price maintained" from some person or persons on such terms that he was able to sell them, presumably at a profit to himself, at a price less than that which the manufacturers prescribed as the retail price of their goods, and a Mr. Reece, who had an address at 50, Wellington Road, N.16, was one of the persons through whom he was able to get such goods. This Mr. Reece had an associate who, according to the evidence of the plaintiff, had been introduced to the plaintiff as Mr. Reece's partner. On Aug. 29 of last year, a gentleman who had been introduced at the beginning of the month as Mr. Reece's partner, but to whom no name apparently had been given, arrived at Mr. Berg's place of business, 229, High Street, Shoreditch, with another man whose name was also not disclosed, and said that Mr. Reece had got some more goods—cigarettes—that he could let Mr. Berg have at a price which would enable Mr. Berg to sell them at less than the prescribed retail price. The cigarettes which Mr. Berg had bought from Mr. Reece in the beginning of August had cost £141. This consignment which Mr. Reece's partner, or Mr. Reece's alleged partner, was offering at the end of August were to cost £72 19s. 0d. Mr. Berg was willing to repeat the transaction. He was told that the goods were to be obtained from the defendants. He knew that the defendants could not and would not supply him with the goods, and that therefore if he sent for the goods in his own name, he would not get them. At the same time there seemed to be some difficulty about Mr. Reece repeating the transaction which had happened in the beginning of August, when apparently Mr. Reece was in funds sufficient to pay for the goods, and so get delivery from the defendants, and then, having got delivery from the defendants, to deliver them to the plaintiff. On this occasion apparently Mr. Reece had not the means to pay for the goods, and apparently, either with reason or without reason, Mr. Berg was not prepared to trust Mr. Reece with the money even for a short time. It was necessary that Mr. Berg should have control of the money until it was safely in the hands of Mr. Moore. That at least would be an inference that might be fairly drawn from the facts which were proved in evidence.

Accordingly, on Friday, Aug. 30, there set out from the plaintiff's place of business, 229, High Street, Shoreditch, not Mr. Berg himself—for that might have been dangerous—but Mr. Berg's hairdresser, who had been provided with what was thought to be sufficient money for the purpose, but was in fact short, and the hairdresser, accompanied by an alleged partner of Mr. Reece, and the other unnamed man, went to Messrs. Sadler & Moore's place of business at 20, Spital Square there to take delivery of the goods which had been ordered on the previous day, either by Mr. Reece or by somebody else in the name of Mr. Reece. They arrived at Spital Square, which I am told is about five minutes' walk. The alleged partner of Mr. Reece preferred to remain outside, and Mr.

Berg's hairdresser and the unnamed man went in and asked for the goods which had been ordered by Mr. Reece, or supposed to have been ordered by Mr. Reece on the previous day. They were asked if they had the money, and thereupon the hairdresser produced the money with which he had been entrusted. It was not sufficient to pay for the goods. The price of the goods was £72 19s. 0d.; he had in fact been only given £70; he wanted £3 more, or £2 19s. 0d. more to pay for the goods. The hairdresser had not got the money, nor had the second unnamed man, so they went outside to consult with Mr. Reece's partner, but Mr. Reece's partner had not got the money, so the only thing they could do was to go back to 229, High Street, Shoreditch, and get the needed £3 from Mr. Berg. So back they went to Berg's shop, and Mr. Berg supplied them with the £3. Again, Mr. Berg thought, although it was only five minutes' walk, it would be indiscreet on his part to go to the defendants' premises, and the hairdresser was sent back with the money. Arriving there he handed the £73 over the counter, and since the bill was only £72 19s. 0d., he received back 1s. in change, and he also asked for and obtained a receipt. The receipt is dated Aug. 29, but that apparently was a mistake; it was undoubtedly by common agreement Friday, Aug. 30, when this transaction took place. The receipt is on the invoice which is addressed to "Mr. J. Reece, 50, Wellington Road, N.16," who is on the document alleged to have been a debtor "to Sadler & Moore, wholesale tobacco dealers" for the sum of £72 19s. 0d., and it bears a revenue stamp of 2d., defaced with a rubber stamp saying "Received with thanks, Sadler & Moore, Aug. 29, 1935, Spital Square, Bishopsgate." The goods, as I said, had been ordered on the previous day, and in order to make sure that no goods which they sell get into improper hands, Mr. Reece being then a person to whom they were at liberty to sell such goods, the consignment was marked throughout with an identification mark which would show that they were goods supplied by Messrs. Sadler and Moore to this man, Mr. James Reece.

Having paid for the goods and obtained the receipt the hairdresser and his companion then asked for the goods, and were then told that the goods would be sent to 50, Wellington Road, Mr. Reece's address. That very morning Messrs. Sadler & Moore had received a letter from 50, Wellington Road, or purporting to be from 50, Wellington Road, and purporting to be signed by "J. Reece" in which he had requested, as indeed he had requested previously according to the letter, that all goods ordered by him should be delivered to his address, and accordingly the hairdresser and his companion were informed that the goods would be sent to 50, Wellington Road. That, however, did not suit them at all. The hairdresser had been sent to get the goods, and it would indeed have been deplorable if he returned to Shoreditch not only without the goods but also without the money, and they went outside to consult

the supposed partner. He then came into the premises, and he then assumed the character, not of Mr. Reece's partner, but of Mr. Reece himself. Here was Mr. Reece himself who had ordered the goods and had paid for the goods, and was asking to have the goods delivered over the counter. It is not altogether surprising that by this time Mr. Moore, who was attending to the matter, and had heard the whole of the conversation, both on the first and second visit of the hairdresser and his companion, was becoming a little suspicious about the persons with whom he was dealing, and he said to the alleged Mr. Reece that he had had a letter from him that morning written on the previous day, and asked him if he could tell him the contents of the letter. The young nameless man made a gallant effort, but it was unsuccessful. It was quite obvious that he was not the writer of the letter, and so they went away without the money and without the goods.

What happened later in the day was that Mr. Berg came, anxious for his money, but he did not get it, and then he got into contact with Mr. Reece, who has not been called as a witness, and Mr. Reece, it is said, drafted a letter, which is exhibit "P.4," and when he had drafted the letter it was typed out and a typed copy of the letter was initialled, so it is said, by this Mr. Reece, although I am bound to say there is some ground for thinking—the letter is not actually signed but only initialled "J. R."—that the person who wrote the "J. R." is not the person who wrote the letter of Aug. 29, to which I have just referred. The letter was in these terms :

Dear Sirs,—A Mr. Berg, 229, High Street, Shoreditch, has been in communication with me and informs me that two men, one lately in my employ, gave an order in my name to your firm. You, acting on my instructions, quite rightly took their money and refused to hand over the goods. Mr. Berg being an innocent party to this dirty business, I think it is quite reasonable to return his money, £72 19s. If in future anyone should try this trick again, hand them over to the police. Trusting we shall have no more trouble of this sort, I remain, Yours faithfully, J. R.

That letter did not move the defendants to pay this £72 19s. 0d. either to Mr. Berg or to the hairdresser, who was the person who actually handed it over, and apparently Mr. Reece has not made any claim for it. Failing to get the money back, Mr. Berg brings this action.

Now the first point that emerged, even at a very early stage in the case, because I gathered from the evidence it is what Mr. Moore said to the three persons who came into his place of business on Friday, Aug 30 : "This is an attempt to obtain goods by false pretences"; and it seems to me, in spite of the able argument of Mr. Glyn-Jones, that it is so. By Larceny Act, 1916, s. 32, re-enacting what was previously the law, it is provided that :

Every person who by any false pretence (1) with intent to defraud, obtains from any other person any chattel . . . shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for any term not exceeding five years.

Mr. Berg, it is true, did not commit the full offence specified in that section, but did he attempt to obtain by a false pretence with intent to defraud this consignment of cigarettes ?

It is strenuously argued that there was no false pretence. It is a bold argument. He sent his servant, the hairdresser, to get the goods, knowing that if Berg went he could not get them, knowing that if his servant disclosed the fact that he was his servant he could not get them. He sent his servant, the hairdresser, to pose as the agent of Reece, to pay the money as the agent of Reece and to take delivery of the goods as the agent of Reece, and the hairdresser maintained the character in which he was intended to appear. He never told Mr. Moore or Mr. Moore's clerk : " I am not Mr. Reece's servant. This is not Mr. Reece's money ; it belongs to Mr. Berg." How far the hairdresser was entrusted with the secrets of the business of Mr. Berg I do not know, but anyhow he had discretion enough, perhaps he had knowledge enough, to know that he must not disclose his true name ; he must not disclose that he was the servant of Berg coming to take delivery of the goods for his master. That was a false pretence, knowingly made, intentionally made, and it is plain beyond all controversy that but for that false pretence, there was no chance of obtaining the goods from the defendants.

Now, was the act done with intent to defraud ? There is the well-known definition of LORD WRENBURY with regard to the meaning of the words " intent to defraud." His Lordship, then BUCKLEY, J., in *Re London & Globe Finance Corporation, Limited* (1), said at p. 732 :

To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit ; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind ; to defraud is by deceit to induce a course of action.

I have no hesitation in saying that in this case Mr. Berg attempted, although the attempt failed, by deceit to induce a course of action on the part of the defendants, Messrs. Sadler & Moore, which would have been an action to their grave injury. If in fact they had supplied goods to Mr. Berg, he being on the " Stop List," the consequences to them might have been consequences of a very serious character in their business. It seems to me that it is a plain case of where there was an attempt to obtain goods by false pretences, and it is nothing to the purpose to say that the fraudulent person who was attempting to commit that crime was in fact willing to pay to the persons he was attempting to defraud the full price of the goods.

Now those being the facts as I find them to be, the question arises, can Mr. Berg under those circumstances, having paid this money with the intention of obtaining goods by this false pretence, now maintain an action in this court to recover the money ? No case has been cited

to me where the court has ever entertained any such action. If dishonest people pay money for a dishonest purpose, and then by good fortune the offence which they designed to commit is not committed, are they entitled in this court to come and ask for recovery of the money? In my opinion they are not. It would be a bad example if this court were to entertain an action by a man for money dishonestly paid for the purpose of committing an offence against the criminal law, and he were allowed to claim from the court an order that the money should be repaid. No case, as I say, has been cited to me where such an action has been entertained ; and there are numerous authorities to the contrary. A highwayman on Hampstead Heath cannot maintain an action for the administration of partnership affairs.

Under those circumstances this action fails. It is an action for money had and received, and such actions sometimes were said to be based upon the principle of *ex aequo et bono*. In this case I can see nothing in the conduct of the plaintiff to which either the word *aequus* or *bonus* can be applied. I think it was dishonest, and the more shocking that the plaintiff himself, I think, does not realise yet that what he did was dishonest. The action will be dismissed with costs.

Glyn-Jones : A defence having been put in, the plaintiff considering that a case for £72 might at that stage go to the county court, issued an application before the master for the case to be tried in the county court ; that application the defendants objected to, and the defendants caused this action to be kept in this court against the will of the plaintiff. In those circumstances, it is in my submission unjust to order that the plaintiff, although he tried to reduce the expense by sending this action to the county court, should nevertheless pay High Court costs. I ask your Lordship to order that the costs the defendants recover subsequent to the date of that application should be on the county court scale. The master also reserved to your Lordship at the trial the costs of that application. My submission therefore is that your Lordship should give to my client the costs of that application, which was a proper one, and also should say that my client should not pay the costs on the High Court scale subsequent to the date of that application.

O'Malley : My Lord, they brought us to the High Court ; then they wanted to go out and we refused. In addition to that there was a counterclaim here ; although it was in a form which was perhaps unnecessary in view of the protection given by the criminal law, it was a point of very great public importance and one which we thought right should be determined by this court.

MACNAGHTEN, J. : Mr. Glyn-Jones, you have argued this case, if I may say so, very well, but you have not, as you see, persuaded me. I take the view that it is a bad case, and it was quite right to have it tried in the High Court. It is a case of importance, if my view of it is

right. There are apparently people who do not appreciate that this was a very dishonest thing to do, and if my view is right, it is as well that they should know, not only for the protection of the public, but for their own protection, that these things may bring them within the reach of the criminal law; that they have got to be honest.

Solicitors: *Lamartine Yates & Morgan* (for the plaintiff); *Russell & Arnholz* (for the defendants).

[Reported by T. A. DILLON, ESQ., Barrister-at-law.]

RE IMPERIAL CHEMICAL INDUSTRIES LIMITED.

[CHANCERY DIVISION (Clauson, J.), May 12, 1936.]

Companies—Share register—Name entered without sufficient cause—Rectification—Companies Act, 1929 (c. 23), s. 100.

The applicant was persuaded by Y. to take part in a certain transaction and to deposit with Y., as security until the transaction was completed, certain shares, of which the applicant was the registered holder. The applicant was told that these shares were to be put temporarily in the name of Y. and for that purpose the applicant signed certain documents, but in no instance was the signature witnessed. By means of a transfer purporting to be executed by the applicant and properly witnessed, the name of Y. was entered upon the company's register as holder of the shares. The applicant in evidence said that she had never signed a transfer of the shares and the witness to the signature admitted that she had not signed as witness in the presence of the applicant. A handwriting expert gave evidence that the applicant's alleged signature on the transfer form was more likely to be genuine than a forgery. The applicant moved to rectify the company's register under the Companies Act, 1929, s. 100. Certain brokers had been instructed by Y. to sell the said shares and they opposed the application on the ground that the transfer was part of a scheme "to rig the market":—

HELD: (i) the jurisdiction of the court to rectify the register is not limited to cases where a name has been entered improperly, but extends to cases where a name stands on the register without sufficient cause.

(ii) there was sufficient evidence, even assuming the transfer to have been a proper one and not a forgery, that the applicant's name had without sufficient cause been omitted from, and Y.'s name had without sufficient cause been placed upon the register, and it ought to be rectified.

(iii) as the brokers did not claim that they themselves or anyone with whom they had entered into any contract had a right to have their or his name put upon the register, their application must be refused, but they had rightly brought the suggestion of illegality before the court. On the evidence the applicant was no party to any illegality.

[EDITORIAL NOTE.] It was suggested here that where a name has been properly entered upon the register, it cannot be removed by the court. In this connection it must be noticed that there was no proof that the transfer was a forgery, the balance of evidence, in fact, appeared to point the other way. The learned judge however, held that wherever a name appears upon the register without sufficient cause, there is jurisdiction to remove it.

AS TO RECTIFICATION OF REGISTER, see HALSBURY, Hailsham Edn., Vol. 5, pp. 232-234, para. 402; and FOR CASES, see DIGEST, Vol. 9, p. 214-217, Nos. 1334-1358.]

Cases referred to :

- (1) *Scott v. Brown, Doering, McNab & Co., Slaughter & May v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 42 Digest 836, 459.
- (2) *Sanderson & Levi v. British Westralian Mines & Share Corpn., Ltd., & London & Westralian Mines Finance Agency, Ltd.* (1898), 43 Sol. Jo. 45; 42 Digest 837, 464.

APPLICATION under the Companies Act, 1929, s. 100, for rectification of the register of Imperial Chemical Industries, Ltd., by the removal therefrom of the name of Clarence Young, and the substitution therefor of the name of Helen Mary Clark, as the holder of 800 ordinary and 900 7 per cent. preference shares in the said company.

Mrs. Helen Mary Clark was, for some time before May 25, 1935, the registered holder of the said shares, and in Mar., 1935, she was approached by one Bullock (and subsequently by one Gardiner) on behalf of Clarence Young, who was, at all material times, a director in Percy Bennett & Co., Ltd. Bullock informed Mrs. Clark that a large pool had been formed in certain shares in J. & J. Coleman, Ltd., and Shell Transport, Ltd., in order to force up the price of the shares, and that the pool had a syndicate behind it which had already put up a quarter of a million pounds. She was invited to take shares in the pool and was assured that, if she agreed to do so, she would suffer no loss, because the syndicate were prepared to purchase back the shares at any time. She said she had no money to spare, and it was thereupon suggested to her that, if she had any share certificates, she might put them up as collateral security, which was explained to her as meaning a deposit of the shares for the purpose of raising money, the shares to be returned to her on the completion of the transaction.

Mrs. Clark eventually agreed, on various occasions, to buy in all 5,000 shares in J. & J. Coleman, Ltd., and gave cheques for amounts equal to half the sums payable in respect of two lots of 50 shares each, though she never received any share certificates. She was subsequently asked to get her share certificates in Imperial Chemical Industries, Ltd., from her bank, and a number of documents was put before her for her signature. She was informed that those documents were necessary in order to put her shares temporarily in the name of Clarence Young, and in no instance was her signature to the documents witnessed. She had, on various occasions previous to the present transaction, signed share transfers on the advice of her own brokers, and knew what they looked like. She insisted in her affidavit and under cross-examination in the witness box that the documents she signed at the request of Clarence Young's agents were in no instance similar to the share transfers she had been in the habit of signing, and emphasised that she made it clear,

when she signed the said documents, that she would not transfer any of her shares except through her own brokers, but stated that she was assured that what she was doing was merely a temporary arrangement, and that she would get her shares back after settling day. Some little time after these transactions her suspicions were aroused, by communications that she received from various companies, that her shares were being sold, and inquiries were instituted from which it appeared that, by means of a transfer purporting to be properly executed by her, her signature being witnessed by a Miss Moggeridge, her shares had been transferred to Clarence Young, who had procured his name to be placed upon the register of Imperial Chemical Industries, Ltd., as holder of the shares. Mrs. Clark thereupon issued a notice of motion for rectification of the register, in respect of which an order for substituted service on Clarence Young, who in the meantime had disappeared, was made, but he did not appear to contest the motion. The application was, however, opposed on behalf of Messrs. Keith, Bayley & Rigg, a firm of stock-brokers, who had acted for Clarence Young in the disposal of various shares, including those claimed by Mrs. Clark.

In addition to the evidence of Mrs. Clark, Miss Moggeridge swore an affidavit upon which she was cross-examined, to the effect that on the instructions of her employers, Percy Bennett & Co., Ltd., she had in fact signed, as a witness, the transfer form, on which Imperial Chemical Industries, Ltd., had acted, but that she had not done so in the presence of Mrs. Clark, whom in fact she had never seen. A handwriting expert was also called who gave evidence to the effect that Mrs. Clark's alleged signature on the transfer form was more likely to be genuine than a forgery.

Cecil Turner, for Imperial Chemical Industries, Ltd.: I do not object to the rectification of the register as asked.

Gilbert Paull, for the applicant: (1) It is clear from the evidence that Mrs. Clark's signature on the transfer is a forgery and that Clarence Young got his name on the register by producing a forged transfer.

(2) Even supposing that Mrs. Clark is mistaken and that she did sign the transfer, Clarence Young obtained possession of the documents of title to the shares in circumstances which amounted to larceny by a trick, and no ownership of a share can pass if the documents of title enabling the transferee to obtain ownership are obtained in that way.

(3) In any case the stockbrokers, Messrs. Keith, Bayley & Rigg, can have no rights in the shares. They were acting for Clarence Young in selling the shares for him to a third party. In these circumstances they could have no better title than Clarence Young, nor indeed as good a title. All they had was the transfer of the shares from Clarence Young to third parties. They never had what is alleged to be Mrs. Clark's transfer, nor do they appear to have had possession of the certificates at all.

F. R. Evershed, K.C., and C. L. Henderson, for Messrs. Keith, Bayley & Rigg: (1) The brokers are entitled to stand in the place of Clarence Young for the purpose of contending that this transfer was not a forgery. Clarence Young instructed the brokers to sell the shares and it was an implied term of the bargain between them that Clarence Young should hand to them his documents of title, in order to enable them to complete the transaction with their purchasers, especially if Clarence Young has received from them the proceeds of the sale of the shares.

(2) In any event, Mrs. Clark is not entitled to maintain these proceedings, because the transaction on which she bases her claim was, on the face of it, an illegal transaction. She has stated that she was persuaded to agree to buy the shares in the pool by a representation that the object of the pool was to force up the price of the shares, which is sometimes called "rigging the market" and which is illegal: *Scott v. Brown, Doering, McNab & Co.* (1) and *Sanderson & Levi v. British Westralian Mines & Share Corporation, Ltd., & London & Westralian Mines Finance Agency, Ltd.* (2). In these circumstances she cannot now be heard to claim back her shares.

(3) It cannot be said that Mrs. Clark's name is omitted from the register for no sufficient cause. It cannot be said that Clarence Young's name ought never to have been on the register. Mrs. Clark has admitted that the arrangement which was made contemplated that Clarence Young's name should be put temporarily upon the register, and on the evidence I say that Mrs. Clark's signature on the transfer was not forged. As a result of what Mrs. Clark did the rights of third parties were affected since, when Clarence Young's name was put upon the register, he became entitled to deal with the shares and to send the certificates to the brokers who dealt with them in good faith. In these circumstances Mrs. Clark is estopped from claiming that Young's name is on the register without cause.

CLAUSON, J.: But I have no one here who says, as against Mrs. Clark, that these shares are their property. I can listen to you only as *amicus curiæ*. You may have some claim against Mrs. Clark, but you are not asking me to put your name on the register.

Paull was not called upon for a reply.

CLAUSON, J.: Mrs. Helen Mary Clark was the registered holder of a considerable number of ordinary and preference shares in the Imperial Chemical Industries. One Young was desirous for his own purposes to get these shares under his own control. Young was a director of the company called Percy Bennett & Co., Ltd., and by means of transactions, to which I will refer later, he found himself in a position to give to Imperial Chemical Industries a document, which represented that the shares which stood in the name of Mrs. Clark were shares in respect of which

he was entitled to be registered, and that company put his name upon the register. Mrs. Clark now comes forward and claims that these shares, whether or not they should ever have been transferred out of her name, must now, as between herself and Young, be put back into her name, because Young has no right of any sort or kind to them. Young has been made a party to these proceedings and the notice of motion has been served upon him, but he does not come forward or claim to oppose the motion. So the lady, as between him and herself, is the only claimant to the shares. The company of Percy Bennett & Co., Ltd., of which Young was a director, have not been made a party to the motion, because they are now in liquidation, and they have intimated that they have no claim to the shares which they desire to set up against Mrs. Clark. I have, however, before me a firm of stockbrokers, who had certain relations with Mr. Young, and they claim that, in some shape or form, they have a right as against Mr. Young to be put in the same position as if he were the registered owner of the shares. But they make no claim that the shares are theirs. Nor do they claim that they have any right to be put upon the register, nor do they claim that there is anybody, with whom they have entered into contracts, who now has a right against Mrs. Clark to be put upon the register in her place. They do, however, draw my attention to this, and I must regard it with some care. They say that Mrs. Clark's case against Young is based upon transactions in which they were jointly concerned by way of a conspiracy to rig the market. It is right that the court should know that, and, knowing that, should not allow anything to interfere with its giving such relief as it thinks is called for, despite the fact that Young has not come forward to make any suggestion on this point himself. But I have read the lady's affidavit, I have seen her in the witness box and have heard her cross-examined, and one thing in my mind is perfectly clear, that is, that she was in no way concerned with any conspiracy whatever to rig the market in shares, of any sort or kind. And I am satisfied of this that, at the time of the transactions in question, her state of mind was such that she would not have appreciated what such an illegal transaction was.

Now I must go back to the facts of the case. The way that Young got these shares into his name on the register was this. He produced to Imperial Chemical Industries a transfer purporting to be signed by Mrs. Clark in the presence of a Miss Moggeridge. This lady also made an affidavit and has been cross-examined in the witness box, and one thing is quite plain, namely that Miss Moggeridge put her name to the transfer without ever having seen Mrs. Clark in her life. So the first thing which we know about this deed is that it could not have been executed by Mrs. Clark in the presence of Miss Moggeridge, if it was ever executed at all. There is that very remarkable feature about it. Moreover, the lady herself says that she has been in the habit of executing

transfers of shares, when it was desirable to do so, on the advice of her own brokers. She admits that she had been approached by Young's emissaries and had been prepared to do what I will explain later, that is to take a certain share in a particular transaction, but she is quite clear about this, that she knows perfectly well what signing a transfer is, that she has signed transfers before, and that she has never seen this transfer that she is supposed to have signed. She is quite clear that, except for the transfers put before her by her own brokers, she has never signed any transfer. That is her evidence.

On the other hand there is the evidence of an expert witness on handwriting, who has been called by Mr. Evershed's clients who, as I have said, are not themselves claiming to be put on the register at all, and the expert witness says that it is quite impossible to be certain, but that, judging by various indications—I do not propose to go into them in detail—he thinks it is more probable than not that this lady's signature on this deed of transfer is genuine. He cannot say more than that. He has given his evidence extremely fairly, and a fair account of the result of his evidence is that, in his view, it is far more probable that the signature is a genuine one than that it is forged. But he says that it is a pure matter of opinion, and he admits that the task of an expert on handwriting is a very difficult one and that an expert is often mistaken.

Let us assume, however, for a moment, that the lady's recollection is wrong and that she has deceived herself and that in fact she did sign this deed. What is the position then? The circumstances in which she signed the transfer, if she did sign it, are these. An emissary of Young came to her and in effect said to her: "You have a chance, if you join a pool in shares in J. & J. Coleman, Ltd., of making a profit, and it is not only a chance but a dead certainty that you cannot possibly lose." You would have thought that anybody experienced in business would have at once become suspicious of such an opportunity of making wealth beyond the dreams of avarice. But Mrs. Clark does not seem to be, if she will forgive me for saying so, very experienced in the ways of the world.

It was also said to her: "The only thing you have to do is to lend your share certificates in Imperial Chemical Industries to Mr. Young temporarily and"—I think it comes to this—"put your shares in his name temporarily. It is a mere matter of form." In other words she was induced to suppose that, if she allowed her shares to be put in Young's name, it was a mere matter of form, and that in a very short time she would gain a large advantage, and that the shares would without any possible doubt be returned to her.

Now it seems to me that in these circumstances it is not surprising, if that story be true, as I believe it to be true, that Mr. Young has not seen his way to appear here to make a claim to retain the shares in his

own name, because it is obvious that, if the shares were effectively transferred, he holds them as a mere trustee for the lady, and that at any time she wants the shares back she is entitled to have them. It was, as he said, a mere matter of form. Of course, to those who are more concerned with these matters and who look at the thing from the point of view of a business man, the whole thing has something of the comic opera, and certain elements of what is sometimes called Gilbertian, about it. But, upon the story which I have been told it is clear that Young, if he admits that story, and he does admit it by not coming here to contest it, cannot possibly claim the shares, and that they should be put in the lady's name, that is assuming that they have ever gone out of her name, and that she ever executed the deed of transfer. I am satisfied that, in the circumstances of the case, and upon the evidence before me, there is sufficient to justify me in holding that the name of Mrs. Clark is without sufficient cause omitted from the register, and that Mr. Young's name is without sufficient cause placed upon the register.

It was rather suggested in argument, as I gather from Mr. Evershed, that, if I am once satisfied that a name was properly entered on to the register, I have no jurisdiction to remove that name, that I have only jurisdiction to remove it if it was improperly, in the first instance, put on the register. I do not take that view. I understand that the section means that if without sufficient cause a name stands on the register, the court has jurisdiction under this section to take it off. I propose accordingly to make the order as asked, and I suppose that if Mr. Turner, who appears for Imperial Chemical Industries wants the costs they must be provided for because he is not in fault. The applicant, therefore, must pay the taxed costs of Imperial Chemical Industries, the amount by which her costs have been increased by reason of the cross-examination of the applicant's witnesses and the evidence put in by Messrs. Keith, Bayley & Rigg to be paid by them, the applicant and Messrs. Keith, Bayley & Rigg to have an order against Clarence Young for what it is worth.

Solicitors : *Michael Abrahams, Sons & Co.* (for the applicant) ; *Golding, Hargrove & Golding* (for Messrs. Keith, Bayley & Rigg) ; *William Morris* (for Imperial Chemical Industries, Ltd.).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

GREAVES *v.* DRYSDALE.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), **May 27, 1936,**]

Practice—Costs—Appeal—Shorthand transcript of evidence at trial—When allowed—R.S.C. Ord. 58, rr. 4 and 11.

The rule that the cost of a shorthand transcript of the evidence given at the trial should not be allowed on appeal unless there has been an agreement in the court below that it should be taken and used as the judge's note is not a hard and fast rule but only a ground for asking the court to exercise its discretion in the matter. Where the shorthand transcript has been used without objection and the appeal could not be properly presented without it, such costs ought to be allowed to a successful party.

[EDITORIAL NOTE.] The rule here referred to has been generally recognised for some time now, but the use of the shorthand transcript is now so common, and so essential to the proper presentation of an appeal, that the modification of the rule which this decision suggests seems now to be necessary.

AS TO R.S.C. ORD. 58, rr. 4 and 11, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 1241, 1259, and see particularly *Notes of Evidence*, on pp. 1261, 1262. FOR THE CASES, see DIGEST, Practice pp. 800, 801, Nos. 3631–3646.]

Cases referred to :

- (1) *Banbury v. Bank of Montreal* (1916), 116 L.T. 42.
- (2) *Hebert v. Royal Society of Medicine* (1911), 56 S.J. 107; Digest, Practice 801, 3640.
- (3) *Seal v. Turner* (1915), 3 K.B. 195.

APPLICATION as to costs of shorthand transcript of evidence.

P. E. Sandlands, K.C., and *A. Safford* for the appellant: The cost of taking a shorthand note of the evidence at the trial should be allowed in taxing the costs against the respondent. The transcript of the shorthand note had been made use of by both sides during the hearing of the appeal. By R.S.C. Ord. 58, rr. 4 and 11, the court has power to allow these costs.

W. L. McNair for the respondent: It is the practice that the cost of the shorthand note should not be allowed, unless there has been an agreement in the court below and the judge has noted the fact.

GREER, L.J. : The party who succeeds in the end ought not to be mulcted with this extra expense, necessarily incurred before he can properly present his case.

McNair : The practice is an old-established one based upon authority. R.S.C. Ord. 58, r. 11, is old and not modern. No support can be drawn from it as a ground for interfering with the old-established practice. In this particular case the judge took a full note and the case could have been tried upon the judge's note. It is the invariable rule of this court not to allow the cost of the shorthand note, unless there has been an

agreement that the shorthand note should be taken and the judge informed of the fact, so that he is relieved from the necessity of taking a note.

GREENE, L.J. : Counsel on both sides conducted the case on the common ground that the shorthand note was a necessary thing for this court to look at. No objection was taken at the time.

McNair : But the cost is not allowed unless there has been an agreement in the court below and the shorthand note is substituted for the judge's note. R.S.C. Ord. 58, r. 11, applies to what material shall be supplied to the court and not with the question of costs. That merely gives the court a discretion to admit the shorthand note and it does not deal with the question of costs. I agree that there is a discretion as to costs, but there is an established rule which the court has acted upon consistently for years, and it would be a grievous burden upon my clients to make them pay the costs of the shorthand notes. [He referred to *Banbury v. Bank of Montreal* (1), *Hebert v. Royal Society of Medicine* (2), *Seal v. Turner* (3)].

GREER, L.J. : This application raises an important question of practice with regard to the occasions on which this court ought to exercise its discretion and allow a successful party in an appeal the costs of a shorthand note. It is quite true that the practice has been for the Court of Appeal not to allow the cost of a shorthand note, unless there has been some agreement between the parties that the shorthand note should be taken and be equivalent to the judge's note. That has been the practice. In my judgment it has frequently resulted in an injustice to the successful appellant, or to a successful respondent. It is time to consider the question having regard to the express rule on the subject to which our attention has been called—R.S.C. Ord. 58, r. 11. It seems to me to imply that the court will consider for the purpose of an appeal any evidence given orally, or such other material as seems to the court material. If the court thinks it expedient to have regard to the transcript of the shorthand note, then that ought to be treated as part of the costs. There is no absolute rule. It is only an argument addressed, and successfully addressed, to me as to the discretion of the Court of Appeal. It seems to me that in this case the appeal could not have been adequately presented on behalf of the appellant, or the respondent, without it, and in these circumstances the shorthand note was used by the appellant without any objection by the respondent and it was used by the respondent as one of the methods of bringing to the attention of the court the questions which had to be decided. In these circumstances, I think it would be an injustice to put upon the successful appellant the burden of the shorthand note without which the case could not have been properly presented to this court. The

rule of practice ought not to be regarded as a hard and fast rule, but only a ground for asking this court to exercise its discretion and to allow the cost of the shorthand note.

GREENE, L.J. : I agree.

TALBOT, J. : I agree.

Solicitors : *Attenboroughs* (for the appellant); *Hair & Co.* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

HAWKINS v. THAMES STEVEDORE CO., LTD., AND UNION COLD STORAGE CO., LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **May 6, 7, 8, 11, 1936.**]

Master and Servant—Liability of master at common law—Dangerous hatchway—Breach of statutory duties.

Factories and Shops—Regulations—Breach—Factory and Workshop Act, 1901 (c. 22), s. 79—Factory and Workshop, Dangerous and Unhealthy Industries, Regulations, (S.R. & O., 1934, No. 279), reg. 12—Docks Regulations, 1925, (S.R. & O., 1925, No. 231).

A workman in a ship in dock fell through a hatchway of which the fencing had become loose and was injured. He was employed in replacing the insulation on refrigerator pipes, and his employers were in no way connected with either of the defendants. He sued the stevedores working on the hatch, and the owners, for negligence and breach of their statutory duty to light the ship efficiently and to fence the hatchway while it remained open. The Factory and Workshop, Dangerous and Unhealthy Industries Regulations, 1934, reg. 12, provides that decks where work is being done must be efficiently lighted when "processes," which include unloading, are being carried on. The defendants contended that the "process" was finished when the hatchways had been fenced in accordance with the regulations; and also that the plaintiff, who was not engaged in any of the processes, was not within the benefit of reg. 37, which provides for the fencing of hatchways:—

HELD: (i) the process of unloading continues until all the hatch covers have been replaced.

(ii) on the authority of *Manchester Ship Canal Co. v. Director of Public Prosecutions* (3), the effect of the Docks Regulations, 1925, was to protect any workman employed in the ship even if not employed on any of the processes and the 1934 Regulations did not withdraw this protection.

[EDITORIAL NOTE.] Apart from questions of fact as to sufficiency of light and contributory negligence, this case turns upon two questions: (a) the duration of unloading; (b) the extent of the protection given by the Regulations, i.e., whether they extend to every workman on the ship although his work is in no way connected with unloading.

AS TO THE REGULATIONS OF DOCKS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 619, 620, para. 1174; and FOR THE CASES, see DIGEST, Vol 24, pp. 916-919, Nos. 117-138.]

Cases referred to:

(1) *Addie, R. & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; Digest Supp.

- (2) *Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce*, [1901] A.C. 79 ; 24 Digest 916, 118.
- (3) *Manchester Ship Canal Co. v. Director of Public Prosecutions*, [1930] 1 K.B. 547 ; Digest Supp.
- (4) *Coggins & Griffith (Liverpool), Ltd. v. Peacock* (1933), 46 Ll. L.R. 113.
- (5) *Howlett v. Shaw Savill & Albion Co., Ltd.* (1924), 40 T.L.R. 778 ; 24 Digest 919, 138.

ACTION by a workman for damages for personal injuries, alleging negligence and breach of statutory duty.

ATKINSON, J., found the following facts. A ship was lying in dock after unloading cargo, being prepared to go to sea in ballast. The plaintiff, a labourer, was working with two other men replacing the insulation on refrigerator pipes ; the company employing him had no connection with either of the defendant companies, who were, respectively, the stevedores who discharged the cargo and the shipowners. On May 17 the stevedore company engaged a shore gang to get the ship ready to go to sea next day : their work was, *inter alia*, to put on the hatch beams and hatches, and clear away rubbish. While the hatches were open, they were protected by a life-line carried on stanchions and stretched tight by ropes. On May 18 the gang had replaced all the hatch covers on the shelter deck, where the plaintiff was working, but one, which was left off for ventilating purposes. The main deck covers were on, and the shelter deck was lit by portable groups of electric bulbs. The neighbourhood of the open hatch was unreasonably dark, and the life-line had become very slack. The plaintiff fell into the hold through the partially unprotected opening and suffered severe injury. He sued both defendant companies for negligence and a breach of the duty imposed by the Factory and Workshop, Dangerous and Unhealthy Industries Regulations, 1934, reg. 12.

F. A. Sellers, K.C., and *J. MacMillan* for the plaintiff.

A. J. Hodgson for the first defendants.

Lord Reading, K.C., and *W. H. Duckworth* for the second defendants.

ATKINSON, J. [His Lordship stated the facts.] : On these facts I have to determine whether the defendants, either or both of them, are responsible in law for the accident. It is said that both were guilty of negligence and that both were guilty of a breach of statutory duties, and that this negligence and default was the real cause of the accident. The plaintiff was working in the hold at the invitation of the owners ; therefore the latter were under a common law obligation to take reasonable care that the premises should be safe for him to work in. I take that from the opinion of LORD HAILSHAM, L.C., in the case of *Robert Addie & Sons (Collieries) v. Dumbreck* (1). LORD HAILSHAM, L.C., says this at p. 364 :

The highest duty exists towards those persons who fall into the first category

and who are present by the invitation of the occupier. Towards such person the occupier has the duty of taking reasonable care that the premises are safe.

By the Factory and Workshop, Dangerous and Unhealthy Industries, Regulations, S.R. & O., 1934, No. 279, reg. 12, there is an obligation which rests upon the owner, master or officer in charge of a ship, expressed as follows :

When the *processes* are being carried on—(a) the places in the hold and on the decks where work is being carried on . . . shall be efficiently lighted, due regard being had [to certain things].

That regulation also says this in subsect. (c) :

All parts of the ship to which *persons employed* may be required to proceed in the course of their employment,

and the regulation as to lighting applies equally to such a place. That duty as to lighting applies only when processes are being carried on. The definition of “ processes ” is as follows (it is not exactly a definition) : “ Processes means the processes above-mentioned or any of them ” and those processes are the processes of :

Loading, unloading, moving or handling goods in, on, or at any dock, wharf or quay and the processes of loading, unloading or coaling any ship in any dock, harbour or canal,

and the order directs “ that they shall apply to all docks, wharves, quays and ships as aforesaid.”

The plaintiff says it is well-settled law that the process of unloading is not complete until the hatch covers are all replaced. The defendants say, on the other hand, that the process is complete either (1) when the cargo has in fact been removed, or, at any rate (2) when the cargo has been removed and either the covers have been replaced or the uncovered hatches are fenced in accordance with reg. 37. I think this question is settled by authority. In the case of *Stuart v. Nixon & Bruce* (2), that very question arose for determination in connection with the process of loading. The plaintiff there was claiming compensation, to which in the circumstances of that case he could only be entitled if the ship in which he was working was a factory, and the ship could only be a factory if and while the process of loading was going on. The loading, in the narrow sense, was complete, but the covers had not been all replaced, and it was held in the very clearest language that the operation of loading was not complete until all the hatch covers had been replaced. The point is dealt with by the EARL OF HALSBURY, L.C., at p. 89 :

I say, so far as the word “ loading ” is concerned, can any one doubt that the whole operation was intended to be included within the words of the enactment ? I should have thought it was impossible to doubt it. Nor do I entertain any difficulty about the stevedore being the person who was doing it. I could quite understand

that, if the crew was engaged in doing it, it could be said that, although the joint action of the stevedore and the crew was "loading," yet the stevedore was not loading but the crew were in respect of this particular matter. First of all as regards the thing done, can it be reasonably contended that the putting in of the hatchway and completing the safety of the vessel and the safety of the cargo by this means was not a loading of the vessel? Would anybody say that if the stevedore had undertaken to completely load such and such a vessel, if he had left the hatches off and not put the beams in for the purpose of securing the hatchways, he had completed his contract? It may be the same question, perhaps, but only a different form of putting it. I should myself entertain no doubt that it was part of the duty of the person loading the vessel to put on the hatchways just as much as to put in the bags in any particular part of the hold.

The matter was next considered in the case of the *Manchester Ship Canal Co. v. Director of Public Prosecutions* (3). There the point before the court was whether the same rule applied to the process of unloading, and again it was held quite clearly (I think the last part of the headnote puts it quite clearly):

that for the purposes of the Factory and Workshop Act, 1901, the covering of a hatch which had been used for the purpose of unloading the ship was ancillary to the main work of unloading, and that the work of unloading was not completed till the hatch was covered.

Then, again, the matter was considered by the court in the case of *Coggins & Griffith (Liverpool), Ltd. v. Peacock* (4). That seemed quite a hard case, because there the stevedores had left the covers off, but they had left the hatchway fenced perfectly properly. Some unknown person had removed the fencing, and yet it was held that they had been guilty of a breach of their statutory duty because the process (whether it was loading or unloading, I forget) had not yet been completed, and therefore the statutory duty of maintaining the fence was still upon the stevedores.

I think the second argument, as to the process being completed when the covers are replaced or the uncovered hatches are fenced, is in direct conflict with the decision in that case, and I think it confuses "duty" with "process." While the process is continuing there is a duty to fence an uncovered hatch when not in use, but performance of that duty cannot terminate the process; and Lord Reading was driven to admit that the logical result of the argument was that the process would be ended if a fence were put up for ten minutes and then removed with the hatch covers still unreplaced. In my judgment I am bound by these decisions to hold that the process of unloading had not been completed on the morning of May 18, but was then in process of being completed by the company in that they were then replacing the hatch covers; and, in my opinion, the shipowner was at that time under a statutory obligation to have the shelter deck sufficiently lighted. In my opinion, the shipowners were guilty of a breach both of their common law obligation to have the premises reasonably safe, and also of reg. 12

in that the place was not reasonably safe for the plaintiff owing to the absence of light.

Now it follows from what I have held as to the process not being completed that the company were necessarily guilty of a breach of reg. 37. Reg. 37 is the regulation imposing the duty of fencing uncovered hatches. It is found in Part IV, and the obligations imposed by Part IV are imposed upon the person who, by himself, his agents, or workmen, carries on the process—in this case, of course, the company. Now the reading of that regulation is this :

If any hatch of a hold accessible to any person employed and exceeding 5 feet in depth . . . is not in use for the passage of goods, coal or other material, or for trimming, and the coamings are less than 2 ft. 6 in. in height such hatch shall either be fenced to a height of 3 ft. or be securely covered.

If the process was continuing, as I hold it was, and if the fence was sagging to within nine inches of the ground, it is plain that there was a breach of that obligation ; and apart from the statutory obligation there is also a common law obligation upon one invitee working upon the premises to warn another invitee working there of any danger which he may have created, and for which he is responsible. Cheetham, the stevedores' ganger, admits he knew that men were working on the shelter deck when he was putting the plugs on, and he ought to have known the condition in which he was leaving the fence, for the condition of the fence was a matter which concerned him greatly because of this regulation. He gave the men no warning at all. It is said in argument that the line was a warning even if loose, but I cannot follow that. I do not think so at all. I think it far more indicative of the work of covering having been finished and the line lying loose awaiting removal, and particularly would this be so where the practice was for the servants of the ship to erect the fence. The ship's carpenter erected, and I infer from that that he would remove. It must also be remembered that Cheetham knew he was immediately going to black out all effective daylight by closing the main hatches.

In my judgment both defendants failed to discharge their common law obligation towards the plaintiff.

It is urged, and strongly urged, by Mr. Hodgson that the plaintiff is not within the benefit of reg. 37, and that he therefore cannot found a claim upon its breach. That matter was first considered in the case of *Howlett v. Shaw Savill & Albion Co., Ltd.* (5). I need not trouble with the facts of the case, but there somebody who was, I think, a labourer, who was not engaged in any of the processes, was injured as a result of a breach by the company, the defendants, of the statutory regulation, and it was held that the plaintiff there was not within the benefit of the regulations. That decision was based upon these words which occurred in the regulations :

I hereby, in pursuance of the powers conferred on me by that Act, make the

following regulations for the protection of persons employed in the process or any of them.

On those words the court decided, and because of those words, that the plaintiff was not entitled to the benefit of those regulations and therefore could not found an action upon their breach. As a result of that decision the regulations were altered and a new edition, I think the 1925 edition, was published, and the point was considered in the *Manchester Ship Canal* case (3), to which I have already referred, and the history of the change in the regulations and the reason for the change was referred to by the Attorney-General, Sir William Jowett, at pp. 553 and 554. After referring to *Howlett's* case (5), and the decision and the reason for the decision, he said :

In consequence of those decisions the Docks Regulations, 1925, were made, in which these matters were put right, the paragraph in the regulations of 1904 setting out the persons for whose protection the regulations were made was omitted in the regulations of 1925,

and LORD HEWART, L.C.J., assented to that as a correct statement of the reason for the change. At any rate, those words being omitted, it was held in that case that *Howlett's* case (5) no longer applied, and that the injured plaintiff working upon the ship was entitled to the benefit of the regulations. I had occasion to consider this precise question in a case tried at Liverpool on July 4, 1934, and accepting the result of those two cases I held there that the plaintiff, although a workman not engaged in any of the processes, was, because of the changed form of the regulations, entitled to the benefit of them, and that he was entitled to found an action for the breach. That case was not appealed and I still think my decision was right.

But it was argued by Mr. Hodgson that the new edition of the regulations, published in 1934, is not quite the same as those which I was considering in the *Liverpool* case (4), and the material change is in the insertion of the words "accessible to any person employed" in the reg. 37 : . . . "if any hatch of a hold accessible to any person employed and exceeding 5 feet," and so on. It is said that those words limit the benefit of those employed in the process. I cannot think that. I think those words are merely descriptive of the hold to which the regulation applies, and bearing in mind the history of the matter, to which I have referred, it seems to me quite impossible to think that if the object of the Minister in making these new regulations was to revive the old position as to this particular regulation, he would have adopted this method of so doing. I think that totally different words would have been used to make it quite clear that he was seeking to get away, at any rate, from the reported decision in the *Manchester Ship Canal* case (3). I hold, therefore, that the plaintiff was within the benefit of the regulations, and that means,

therefore, that I find both defendants were guilty on May 18 of both common law negligence and of breach of their statutory duties.

[His Lordship then found that the plaintiff was not guilty of contributory negligence; and gave judgment for £800 with costs against both defendants.]

Solicitors : *L. Bingham & Co.* (for the plaintiff) ; *Botterell & Roche* (for both the defendants).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

MURRAY v. SCHWACHMAN, LIMITED.

[KING'S BENCH DIVISION (Hilbery, J.), **May 28, 1936.**]

Factories and Shops—Dangerous machine—Obligation of workman to use guard—Instruction by employer—Factory and Workshop Act, 1901 (c. 22), s. 10—Woodworking Machinery Regulations, 1922 (S.R. & O. 1922, No. 1196), regs. 17, 23.

An employee in a woodworking factory was injured while operating a spindle machine. The machine had been supplied with a guard, but in view of the waste of time caused by the use of the guard, the employee was instructed to operate the machine without the guard, and was so doing at the time of the accident. The employee brought an action alleging a breach by his employers of the Factory and Workshops Act, 1901, s. 10 :—

HELD : (i) the obligation to use the guard imposed upon a workman by the Woodworking Machinery Regulations, 1922, reg. 23, is absolute and cannot be waived or abrogated by an order of his employers.

(ii) the accident was due to the breach of the employee's statutory duty and he could not maintain the action against his employers.

[**EDITORIAL NOTE.** The Factory and Workshop Act, 1901, requires dangerous machinery to be fenced. The Woodworking Machinery Regulations of 1922, however, require that where a guard or fence is provided, the employee shall use it. The decision here is that the duty of the employee to use the guard is paramount, and any neglect in this respect cannot be excused even if the employer has suggested or ordered that the guard should not be used. The employee therefore cannot recover where the accident is due to his failure to use the guard.

AS TO DANGEROUS MACHINERY, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 594-596, paras. 130-133; and FOR CASES, see DIGEST, Vol. 24, pp. 908-912, Nos. 62-84.]

Cases referred to :—

- (1) *Moore, A. G. & Co. v. Donnelly, Fife Coal Co. v. Sharp, Fife Coal Co. v. Fyfe*, [1921] 1 A.C. 329; 34 Digest 302, 2501.
- (2) *Stephens v. Dudbridge Ironworks Co.*, [1904] 2 K.B. 225; 34 Digest 492, 4070.

ACTION for damages for an injury received by the plaintiff on Nov. 14, 1935, while working in the defendants' factory. The facts are set out in the judgment.

David Weitzman for the plaintiff.

Edgar Dale for the defendants.

HILBERY, J. : In this case Samuel Edward Murray, who is a young man aged now about 19 years, brings his action to recover damages for an injury which he received on Nov. 14 of last year while at work in the factory where the business of the defendant company was carried on. It is a woodworking factory and the plaintiff was a spindle hand. He was known at the time as a spindle improver, that is to say he was still a learner. He had not yet become that which he desired eventually to become, namely, a fully qualified spindle hand. On the day in question he was at work at the spindle machine when his hand slipped from the wood which he was pressing against the teeth of a rotating saw and his little finger of the right hand and the ring finger of the right hand came in direct contact with the revolving saw so that as a result he has now had a complete amputation of the little finger and an amputation of all but the stump of the ring finger of the right hand, and he will of necessity, of course, have that defective right hand, mutilated in that way, with him for the rest of his life. That, of course, was a serious accident.

On Nov. 19 he put the matter in the hands of a solicitor, who wrote that he had been instructed by the infant plaintiff to act for him in connection with his claim for compensation for injuries received arising out of an accident at the defendants' premises on Nov. 14, he being employed at the time as a spindle hand. After further correspondence in which it had been stated that liability was admitted for payment of compensation under the Workmen's Compensation Act, and during which the solicitor insisted upon dealing with the matter on behalf of the infant plaintiff as he was the solicitor instructed, and not having any of the matter dealt with by the infant direct, workmen's compensation was paid in answer to those demands. There was an attempt made to settle the payment of compensation for a lump sum and on Dec. 23 the solicitor for the infant plaintiff wrote :

Re Workmen's Compensation Act. With reference to our recent telephone conversation, I have now taken the instructions of my client on your offer of £75. The offer is not accepted. My client is quite satisfied to receive the weekly payments.

And he did receive, as he had received, weekly payments of 30s. per week. The matter continued thus until Jan. 30, 1936, when those acting for the defendants gave notice that in accordance with the Workmen's Compensation Act, 1925, s. 12 (3) on the expiration of 10 clear days they intended to terminate the plaintiff's weekly compensation. They enclosed, as they were required to do by the Act, the necessary certificate from their medical practitioner and a certificate certifying that the plaintiff was wholly recovered and fit for his ordinary work, that the amputation and the stump of the ring finger were well consolidated, that the grip of the hand was fairly good and that he could do the work of a wood machinist. That was acknowledged on Feb. 1 and the result

of that notice that the weekly payments by way of compensation would be discontinued was to precipitate apparently a closer examination into all the circumstances attending the accident or, if there had already been a close examination of them, to precipitate a re-examination to see whether some course more advantageous to the plaintiff could not be devised than that which was working out for him under the Workmen's Compensation Act. On Feb. 7 the plaintiff's solicitor writes and says :

I have now gone very carefully into the details of the accident suffered by my client Mr. Samuel Edward Murray on Nov. 14, 1935, and it appears from the evidence in my possession that the machine causing the injuries to my client had been used for a considerable time by the injured man without a guard, and that such fact was known to his employers, and was so used under the active supervision of the employers' supervisors. It is clear that the machine is a dangerous one so used and that under the Factory and Workshop Act, 1901, s. 10, there was a clear duty on the part of the employers to keep the machine properly fenced. The injuries were undoubtedly caused by the failure to guard the machine. In the circumstances, my client, who as you are aware is an infant, clearly has a good claim at common law.

That was the first occasion on which any suggestion had been made that the plaintiff had a cause of action at common law in respect of this alleged breach of statutory duty to guard or fence this machine and, following that new assertion, the plaintiff brought this suit. He brings this claim in those circumstances and asks for damages for the injury done to his hand. He complains of the accident on Nov. 14, 1935, while he was employed and working in the defendants' factory and alleges that it was brought about through the defendants' breach of their statutory duty under the Factory and Workshops Act, 1901, s. 10. He says that the defendants were in breach of their statutory duty in that :

(a) they did not fence securely or at all the said machine and the said revolving saw ; (b) they did not maintain in an efficient state the fencing of the said machine, and/or of the said revolving saw whilst the said machine was in motion or use ; (c) they required the infant plaintiff to work in a place and/or position which was dangerous and unsafe owing to the absence of secure and efficient fencing to the said machine and/or to the said revolving saw, and of this danger or lack of safety the defendants knew or ought to have known and the infant plaintiff was ignorant.

He complains that :

(d) they failed to give any or sufficient warning to the infant plaintiff that the said machine and/or the said revolving saw were, in their unfenced condition, dangerous ; (e) they required the infant plaintiff to work at or near moving and/or dangerous machinery.

To that the defendants said, by way of pleas, that they were not guilty of the breach of statutory duty, that is to say that they performed their statutory duty. They said that if the plaintiff was injured in the way of which he complained, he was himself guilty of a failure to use and

maintain in proper adjustment the said guard contrary to the Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 23, and failed to take reasonable care in working the machine. Lastly, they said he had after the accident elected to accept compensation, had received and accepted the compensation which he had elected to take and that that election of his to accept compensation was fit and proper in the circumstances and beneficial to him as an infant and that the defendants would now rely upon the Workmen's Compensation Act, s. 29, as a defence to the claim in these proceedings.

Now the other circumstances that I need detail as they have come out in evidence are these. The defendants' factory is a woodworking factory. In the room in which the spindle machine is situated, in which the plaintiff was working at the time of this accident, there was a number of other machines and there were at work about five other employees. The spindle machine at which the plaintiff was working is a machine which works a circular saw in the horizontal plane. That circular saw is used in the horizontal plane revolving immediately above the surface of the table upon which any piece of wood which it is desired to groove can be placed, and the edge of the wood when brought in contact with the revolving saw is grooved by the revolving saw to such depth as is required. There are photographs of the machine. When the machine is being used for grooving a straight piece of wood there is affixed to the table a pair of fences, and those present a flat and vertical surface of metal on either side of and close up to the revolving saw. Their position can be adjusted so that when a straight edge of a piece of wood is pushed against and along the surface of the one on the right and so against the front of the revolving saw, the wood thus pressed will have a groove made in it, the depth of which is represented by the amount of projection of the periphery of the saw as it revolves against the face of the two fences. If the machine is being used for curved work those two fences have to be removed. They are affixed to the table by a flat part which is in the horizontal plane and clamps down on to the table at the back of these vertical fences.

That was the machine and it was that sort of machine at which the plaintiff was at work. That machine was, I find on the facts, undoubtedly a dangerous machine. The plaintiff went to that employment in Nov., 1934. In May, 1935, the factory inspector visited the factory and called attention to this machine and required the provision of a proper guard. The defendant company's managing director, Mr. Schwachman, who had been a practical woodworker in his early life, had never heard of this guard for spindle machines. On the other hand, the plaintiff says that at the employment at which he was prior to going to the defendants, he worked at a spindle machine which was provided with a guard. Mr. Schwachman, who had all his life previous

to becoming the managing director of this company worked as a practical woodworker, said he had never seen such a guard, he had been accustomed to regard the machine as sufficiently safeguarded when the fences were up on either side of the wheel. I have no doubt that Mr. Schwachman with his experience regarded the guard, when it was provided, as something which was unnecessary and in excess of what was reasonably required. However, in obedience to the factory inspector's orders he purchased and provided a guard. The guard was a heavy piece of mechanism which had to be bolted on to the machine at the back of the circular saw. It is a heavy casting which allows a circular piece of iron to be brought down over the saw, and then on the front of that there is a kind of vizor of metal which goes partially round the circle so as to screen the teeth of the saw from the worker's hands when that vizor is dropped to a position in front which will permit the work to be done, but not permit a space above the work, sufficient to enable the fingers of the worker to come in contact with the saw. I have seen the actual guard produced. Mr. Schwachman, as I say, provided that. Mr. Rimer, his foreman, had the appropriate piece of the machine bored so as to take the bolt by means of which, and a nut, this guard could be secured in position on the machine, and the guard was duly set up.

It is important to notice that in working this machine, as the very regulations in connection with it show, you can only use the two straight fences, which I have mentioned, when straight woodwork is being worked upon at the machine. For curved work you must remove those fences and the evidence is (and I am sure it is right) that at the spindle machine all day long you may have different sorts of work coming to the spindle hand to be worked upon, and he very likely has a short spell of work on straight work and then a spell of work to be done on curved work, with the result that he has constantly to be shifting the fences. Once this guard was in position what was involved in the ordinary day's work at this machine was therefore this, that in addition to unbolting and moving the fences every time some curved work was to be done and replacing them every time some straight work came to be done, the whole of this guard apparatus had to be unbolted and removed, first of all, from the machine, and when the operation was gone through of putting back the fences this guard had in addition to be put back and readjusted so as to bring it, and what I have called the vizor that came down in front of the actual guard, into the appropriate and proper position. Of course, all that took extra time.

The plaintiff, in the first place, after he had this guard supplied used it and, of course, it took extra time. He says that there came an occasion when Mr. Schwachman said "Do not use it, it is only a waste of time. It is there if anyone comes in." "In consequence," says the plaintiff, "I did not use it. I did not keep putting it on and taking it off. I did

not use it. I told Mr. Rimer, the foreman, that the governor had told me not to use the guard and asked what I should do and Mr. Rimer said, 'It is the governor's prerogative, do as he orders.' Whether that exactly represents what took place or not of course I am very doubtful, but I am satisfied that something of the sort did take place. He did get from Schwachman, I am satisfied, a direction or order not to use this guard because it was a waste of time. I am satisfied that the plaintiff told me the truth when he was telling me that, but in addition it is exactly in keeping and consonant with the circumstances. He had had a guard on the spindle machine upon which he worked at his former employment. He was accustomed to a guard. Mr. Schwachman, a man, of course, old enough to be his father, who had had a lifelong experience in the woodworking trade, and had been a practical man himself, had never been accustomed to a guard. He had worked at a spindle machine, and seen others doing it, and regarded it as a machine which could be worked without any such apparatus, and his attitude towards it, I am sure, was that this apparatus was, as I have said, quite an unnecessary thing demanded by the factory inspector.

I am satisfied he did tell the plaintiff not to use it, and that piece of evidence by the plaintiff is corroborated by Mr. Rimer, who admits that the plaintiff did say something like that to him. The circumstances were these. Mr. Rimer saw the plaintiff at work on the machine without a guard and said he must use the guard, whereupon the plaintiff said to him that he was not using the guard because it was the governor's orders not to use it, or something to that effect. I asked Mr. Rimer what his reply was, whether he would reply in those circumstances "Well, if the governor says that, there is the end of it" or something like that, and he said "Yes." Now Mr. Rimer I say at once was, I think, an honest witness and with whose position as a witness in a case like this I very much sympathise. He has been five years in this employment; he is a foreman, a responsible man, and it is an extremely embarrassing position to be called in to give evidence in a dispute between somebody who is a worker on the one hand, and the employer on the other hand, in which there is an allegation that the employer has ordered a machine to be worked, in the very workshop of which this man is foreman, contrary to some regulation. In those difficult circumstances Mr. Rimer, I thought, emerged with great credit from the witness box. I am satisfied, in those circumstances, that this machine at the time was being used by the plaintiff without the guard and because the defendant, Mr. Schwachman, had told him he was to use it without the guard. The plaintiff had accepted that as an order and in obedience to that went on using the machine without the guard. The consequence was that on this day when he was grooving a piece of wood, which was a small piece of wood only $8\frac{5}{8}$ in. long by $1\frac{1}{8}$ in. wide by $\frac{7}{8}$ in. thick, upon which the

plaintiff was endeavouring to stab a $\frac{5}{8}$ -in. groove, his hand slipped and he met with the accident.

I am satisfied that after May until Nov., 1935, there were many occasions when Mr. Schwachman, a practical man himself, had given direction and instruction to this young improver at this machine when the guard was not on. I am satisfied that the foreman, after the date when he had had that conversation with the plaintiff, must have seen the machine in use from time to time without the guard. He said to me exactly what I should expect him to say if he was a truthful man, that when the plaintiff said to him "I am using it because the governor has told me to use it without the guard, that it is a waste of time to have the guard on," and the foreman had said "If those are the governor's orders that is his prerogative and I do not interfere further," it ceased really to be a matter in which the foreman concerned himself as to whether this guard was on the machine or not.

Those are the circumstances. The plaintiff now says that it was a dangerous machine and I find that it was. If it was a dangerous machine it was the subject of an order by the factory inspector for a guard to be fitted and at the time of the accident it had not the guard on. All that is quite true and is established, but the difficulty which, in my view, is insurmountable is this, that not only does the Act of Parliament require that the defendants shall provide and maintain a proper guard, not only does the Woodworking Machinery Regulations, 1922, reg. 17, require that :

The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard, having regard to the nature of the work which is being performed,

and not only does that statutory rule and order also make it the duty of the defendants to observe that regulation, but it also makes it the duty of every person employed, that is in the position of the plaintiff, to observe part 2 of those regulations and part 2, which defines the duties of persons employed, provides by reg. 23 :

Every person employed on woodworking machines shall use and maintain in proper adjustment the guard provided in accordance with these regulations, except when owing to the nature of the work being done the use of the guards or appliances is rendered impracticable.

It is, as LORD WRIGHT, M.R., has pointed out, statutory negligence on the part of the employer if he is guilty of the breach of such statutory duty as is here alleged against him, but the very breach of statutory duty which is here alleged against the defendants is also, by reason of reg. 23 which I have read and the circumstances of this accident, the breach of statutory duty on the part of the plaintiff which is alleged against him by the defendants.

On the facts, as I have stated them, there can be no doubt that the accident was caused through the absence, on the occasion in question, of the guard, but it was the absolute duty imposed by Parliament on the person employed on that woodworking machine to work and maintain in proper adjustment the guard provided in accordance with those regulations. From the obligation to do that duty imposed upon him absolutely in law he cannot escape. His cause of action upon which he relies cannot even be established in court in the circumstances of this case without his establishing at the very time that he establishes a breach of statutory duty by the employer the same breach on his part of a statutory duty imposed upon him by reg. 23. That in my view must disable him in a court of law from succeeding. If breach of the statutory duty, that is the failure to use and maintain the guard, is statutory negligence on the part of the employer, where the very same regulations impose that same statutory duty on the employee, his failure must necessarily be statutory negligence on his part and the cause of the accident.

I am not unaware that that sounds hard where I have come to the conclusion that the plaintiff was so acting because of an order of his employer, but I think that no employer by giving an order can discharge or alter the plaintiff's obligation to do that which the statutory regulation imposes upon him the duty of doing. It might be possible for the employer by giving an order to waive any contractual duty which the employee had expressly or impliedly undertaken towards the employer, but here the duty in which the plaintiff failed and which resulted in his accident was an absolute duty imposed upon him by the statute. That I am satisfied the order of the master could not waive or abrogate. LORD BIRKENHEAD, L.C., said in *Moore & Co. v. Donnelly* (1), at p. 339, speaking of statutory prohibition :

Nor can it be made the subject of waiver or of informal modification.

LORD SHAW at p. 348 of the same report said :

In the case of statutory rules, these questions do not arise. It is not possible to abrogate them except by a statutory repeal or an administrative regulation which has statutory force, and all parties, whether employer or workmen, who were art and part in such a contravention, stand liable to the penal consequences prescribed.

Equally, of course, they stand liable to such disabilities in a claim as result from the consequences of a breach of those regulations. I think therefore that for these reasons, the plaintiff's claim here must fail.

Holding that view, I need not decide, and it does not fall to me necessarily to decide, the point about election under the Workmen's Compensation Act. The result of this action is, I think, that it forms an illuminating example of the value of the Workmen's Compensation

Act, and the wisdom of the decision which was first come to in this case by the advisors of the plaintiff when they accepted, on his behalf, workmen's compensation. I myself, as I am not bound to decide this point, would prefer to say as little about it as possible. My attention was called to the case of *Stephens v. Dunbridge Ironworks Co., Ltd.* (2). I think it is clear from what was said in the Court of Appeal then that whenever an infant worker has made an election under the Workmen's Compensation Act to take workmen's compensation, and has thereby become barred from recovering at common law, the matter to be considered is whether that election, treated as a contract by the infant, is or was for the infant's benefit. If the consideration whether that contract is for the infant's benefit is to be the consideration of whether it was in the circumstances as they were known at the time it was made, for the infant's benefit, of course, one set of considerations and one set only would apply, that is the circumstances known to all parties at the time. If one is entitled to look at the matter with the wisdom that comes after the event, of course, quite a different set of considerations would apply. It is not necessary for me to decide that matter in the view which I take of this action and I therefore refrain from doing so.

As this matter may well go to a higher court for decision, it is perhaps better that I should assess what would have been the damages I should have given to the plaintiff had he succeeded, so that once and for all that matter is out of the way. I think the loss to the plaintiff which he suffered in the mutilation of his hand, which I have seen, and loss to him as a consequence as a manual worker, in spite of all what was said optimistically enough by defendants' counsel, as is always said by defendants' counsel, is a grievous loss with which one must have every sympathy, but sympathy does not determine this matter. Weighing it as well as I can, and knowing how well spoken of this young man was as a workman, having regard to what were obviously his prospects in his own line of work and the handicap which he must suffer, as well as the disfigurement with which he as a young man has to go through life, and about which he may very well be sensitive, I should have awarded him £750. As it is, there must be judgment for the defendants with the usual consequences.

Solicitors: *T. V. Edwards* (for the plaintiff); *C. St. A. Butcher* (for the defendants).

[Reported by GERALD ABRAHAMS, ESQ., Barrister-at-Law.]

BERTRAM v. WIGHTMAN (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **May 15, 1936.**]

Income Tax—Lands—Grounds of mansion house—House and grounds vacated—Assessment—Income Tax Act, 1918 (c. 40), sched. A, No. VII, rr. 1, 2, 4.

The appellant vacated certain lands, gardens, woods and plantations which surround Abington Hall, on Dec. 2, 1933, and has not since then made use of them. It was found as a fact that in so far as such lands consisted of lawns, gardens, drives and groves, they could not be let without the house and there could be no profits or gains therefrom :—

HELD : the appellant was assessable to income tax under scheds. A and B as the occupier of the lands in question in years when neither he nor anyone else made any use of them ; but the commissioners should consider whether the assessment of such grounds should be decreased when the hall was unoccupied in view of the fact that no profit or gain could be made from part of the lands in question.

[EDITORIAL NOTE.] This case turns upon the construction of Income Tax, 1918, sched. A, No. VII, r. 2, and the meaning of the words included there : “ Every person having the use of any lands or tenements.” The question is in short : does “ use ” mean beneficial occupation in the sense in which it is used in rating law. The answer here given is that it does not mean such occupation, but that the lands are to be assessed whether they are beneficially occupied or not.

AS TO UNOCCUPIED LANDS, see HALSBURY, Hailsham Edn., Vol. 17, p. 50, para. 96 ; and FOR THE CASES, see DIGEST, Vol. 28, p. 7, Nos. 15, 16, and pp. 15, 16, Nos. 78, 79.]

Cases referred to :

- (1) *Back v. Daniels*, [1925] 1 K.B. 526 ; 9 Tax Cas. 183 ; 28 Digest 15, 74.
- (2) *R. v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581 ; 38 Digest 423, 5.
- (3) *Liverpool Corpn. v. Chorley Union Assessment Committee & Withnell Overseers*, [1911] 1 K.B. 1057 ; [1912] 1 K.B. 270 ; 38 Digest 531, 769.
- (4) *Inland Revenue Commissioners v. Wemyss* (1924), 8 Tax Cas. 551 ; 28 Digest 106, Case (p).
- (5) *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.*, [1895] A.C. 117 ; 38 Digest 424, 7.
- (6) *Winstanley v. North Manchester Overseers*, [1910] A.C. 7 ; 38 Digest 452, 189.
- (7) *R. v. St. Luke's Hospital* (1760), 2 Burr. 1053 ; 38 Digest 461, 248.
- (8) *Hill v. Gregory*, [1912] 2 K.B. 61 ; 6 Tax Cas. 39 ; 28 Digest 8, 28.
- (9) *Ystradgofwg and Pontypridd Main Sewerage Board v. Bensted*, [1907] A.C. 264 ; 28 Digest 7, 15.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax acting for the Division of Linton in the County of Cambridge for the opinion of the King's Bench Division of the High Court of Justice. The facts fully appear in the judgment.

O. Bertram and *J. Vaughan* for the appellant.

The Solicitor General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J. : In this case, as I have formed my view, I think it would be convenient to express it now. The appeal is from the commissioners who have decided that the assessment that was made upon the appellant should stand under scheds. A and B in respect of certain lands, gardens, woods and plantations which surround the appellant's house, "Abington Hall," which he vacated on Dec. 2, 1933, and has not since made use of. He has made this slight use of the kitchen garden adjoining Abington Hall, that a certain amount of weeding was done there, and a small quantity of asparagus which, as I gather, continued to grow though it had not been cultivated since Dec. 2, 1933, was cut and sent to his son ; but as to this amount of user of the lands, gardens and grounds for the purpose of this appeal, the appellant's appeal with reference to the kitchen garden was withdrawn, and with reference to the rest of the grounds, woods and plantations there has been, as I understand the case, no user at all. In those circumstances the question is whether the appellant is taxable under scheds. A and B as being the occupier of these grounds and woods. The question turns upon the meaning of the rules in the Income Tax Act, 1918, sched. A, No. VII. Before I consider the meaning of those rules I observe that No. 1 of sched. A provides that :

In the case of all lands, tenements, hereditaments or heritages capable of actual occupation . . . the annual value shall be understood to be,

so and so. So that the lands have to be capable of actual occupation, and it is clear that in this case they were capable of actual occupation. Then the question turns upon the meaning of rr. 1, 2 and 4 of No. VII. Rule 1 is :

Save as in this Act provided in any particular case, tax under this schedule shall be charged on and paid by the occupier for the time being.

Rule 2. is :

Every person having the use of any lands or tenements shall be deemed to be the occupier thereof.

and rule 4 is :

Tax under this schedule shall be charged on all lands, tenements and hereditaments' whether occupied at the time of assessment or not, but if any house is or becomes unoccupied for the year or for part of the year of assessment, the tax shall not be levied thereon during the period while it is so unoccupied and the general commissioners, on proof of the period during which the house was unoccupied, shall upon appeal discharge the tax in respect of that period.

The question that I have to decide is : what is the meaning of the words "having the use of any lands or tenements" within the meaning of r. 2 ? Do those words mean "entitled to the beneficial use of the lands" or do they mean "actually using the lands ?" The appellant contends

that they mean the latter, actually using, and that if the owner of lands does not make any use of them at all, he is not a person having the use within the meaning of r. 2, that therefore he is not the occupier and that therefore no tax can be imposed under scheds. A or B, because there is no occupier to be charged; that is to say, of course, on the assumption that there is nobody else but the owner who has the use in that sense of the lands in question. The appellant admits that if that is the meaning of r. 2 there is an apparent conflict between r. 4 and rr. 1 and 2, because by the terms of r. 4, which I have just read, the tax is to be charged on all lands, tenements and hereditaments that are occupied at the time of the assessment or not, and in my judgment that is a conflict between the two rules which cannot have been intended, and if it is therefore possible to give a fair interpretation to the words in No. VII, r. 2, which disposes of this conflict, that interpretation ought to be given. It seems to me that the words "having the use of" may fairly be given the interpretation of "entitled to the beneficial use of any lands or tenements," and I think that view is supported by the fact that that rule is a definition of the word "occupier" which contemplates, by the use of the words "shall be deemed to be," the fact that the person so defined is not the occupier in fact but is only deemed to be the occupier. That is so because r. 4 provides that the tax shall be charged on all lands whether occupied in fact or not. If they are not occupied in fact, the person who has a right to use them, or who has the use of them, may still be deemed to be the occupier although he is not in fact in occupation. That seems to me to be the fair interpretation of the words "having the use of any lands or tenements" within the meaning of r. 2, having regard to the provisions of r. 4. The view put forward by the appellant is supported by a passage in the well-known book on Income Tax, written by His Honour JUDGE KONSTAM, 6th Edn., at p. 50, where he points out that the words "charged on" in r. 4 are used with a different meaning from that of the same words in r. 1:

The person is "charged" in the sense that he is commanded to pay the tax the land only in the sense that the property in it gives rise to the liability and that its value affords the measure of the tax to be paid,

and he continues:

It is submitted, therefore, that the effect of this rule as far as non-occupation is concerned is merely that the inland revenue authorities need not enquire, before making their assessment for the year, whether any of the lands, tenements and hereditaments assessed are occupied or not. If there is no occupier in fact, there will be no one liable either to pay the tax in the first instance or to bear it by deduction; for the Act makes no person liable to pay except the occupier.

I need not go on any further, but he says, therefore, that although r. 4 says that tax shall be charged on all lands, that is to say, in respect of

of all lands, whether occupied at the time of assessment or not, that means that tax shall not be charged on all lands which are not occupied because there is nobody upon whom the tax can be levied. In my opinion that argument is unsound because of the definition of "occupier" in r. 2. Now a further difficulty was raised by the appellant because, he said, that it has been laid down that the law of rating as to what is occupation is applicable to income tax, and a passage in the judgment of SCRUTTON, L.J., in *Back v. Daniels* (1), at p. 201, was referred to for the purpose of supporting that view. It is true that SCRUTTON, L.J., said, this :

Sched. B is levied on occupiers, and "occupiers" who are charged with the tax under sched. A with a power of deduction from the rent due to the owner, are defined in No. VII, r. 2, as persons having the use of the land. The term is probably used in the same sense as in the law of rating. That sense may be collected from the judgments of LUSH, J., in *R. v. St. Pancras Assessment Committee* (2), at p. 588, and of BUCKLEY, L.J., in *Liverpool Corporation v. Chorley Assessment Committee* (3), at p. 287, and appears to involve possession of a permanent character such that trespass could be brought by the occupier with the enjoyment of a benefit from the land.

It is said, therefore, that that is laying down for all purposes that the law of rating as to occupation is applicable to the Income Tax Acts, but in my opinion that observation cannot be pressed to that extent. SCRUTTON, L.J., was not considering the case which I have to deal with here. He was dealing with the case in which the question was whether a wholesale firm of potato merchants who were using land for the purpose of growing potatoes, land which belonged to a farmer, and which was partly farmed by the farmer, had the use of the land so as to be occupiers within the meaning of No. VII, r. 2, and all that the court did was to hold that the respondents in those circumstances had the use of lands in the full sense ; that is to say, they had the beneficial use, and it was only for that purpose that SCRUTTON, L.J., was referring to the rating cases. The only other authority to which my attention has been drawn for the purpose of showing that the rating cases are directly applicable to income tax for the purpose of occupation, was the case of *Wemyss* (4), at pp. 575 and 576. But there again the Lords of Session, and the LORD PRESIDENT in particular, were not dealing with the question which I have to decide, but were dealing with a case where Lord Wemyss, so long as the trustees of his father's will did not let a certain house which belonged to them, was permitted to live in it, and what the LORD PRESIDENT said there was this :

So far as the civil fruits of the subjects are concerned it is plain that the respondent is completely cut off from them and from all opportunity of making any. The trustees alone can let them. The benefit conferred on the respondent, such as it is, I have described as a personal privilege, because I can think of no other apt

description for his relation to a mansion-house and its appurtenances in which he is indeed allowed for the time being to reside, but which nevertheless remain in the hands of trustees and never leave their true possession and control.

Then he goes on on p. 576 :

Neither, in my opinion, is such a personal privilege as that enjoyed by the respondent, devoid as it is of any assured permanence and dependent at any time on the exercise of a discretion by the trustees. The trustees, and not the respondent are in these circumstances the true "owners," possessors, and (in my opinion) "occupiers" also, of the subjects. At any rate, they and they alone stand in a relation of "ownership" to them. I am therefore of opinion that the commissioners rightly decided that the respondent had no income arising from "ownership of lands" in respect of Wemyss Castle.

So that there again the learned judges were not dealing with a case where there was no occupier, as is suggested to be the case in the present case. The LORD PRESIDENT was saying in that passage that the true occupiers of Wemyss Castle in that case were the trustees. The application of this argument is this, that it has been held in connection with rating cases, or at any rate the view has been indicated in connection with rating cases, that if the land is derelict, is left by its owners, and is not occupied by anyone else, it becomes not rateable. That view is indicated by HAMILTON, J., as he then was, in the case of the *Liverpool Corporation v. Chorley Assessment Committee* (3), which was the case in which the Liverpool Corporation were rated in respect of the gathering ground for their waterworks, a gathering ground from which they had excluded all members of the public, so that the water which was there gathered by nature should not be either used or contaminated and which they also used for the purposes of sport. That is reported in the lower court, at p. 1057, and the passage in the judgment of HAMILTON, J., is at p. 1072, where he says :

The judgment of LORD HERSCHELL, L.C., in *Holywell Union Assessment Committee v. Halkyn Drainage Co.* (5), quoted in the *Winstanley* case (6), says that if it could be shewn that the drainage company were the owners of the tunnel, this would negative the idea of their being entitled merely to an easement; that, being owners, they would *prima facie* be the occupiers, and that they would be so regarded unless the occupation were shewn to be in someone else. That passage relates to a tunnel in use, and leaves open the question whether or not proof of ownership and of nothing else might not in some cases—say of a derelict tenement—be consistent with there being no occupation in fact. The suggestion that this passage goes further, which is supported by reference to the *St. Luke's Hospital* case (7) and *R. v. St. Pancras Assessment Committee* (2), cannot, I think, be sustained.

Then he goes on to cite those cases, and he there indicates the opinion that in the case of a derelict tenement there would be no occupation in fact, or there might be no occupation in fact, and the hereditament, therefore, would not be rateable; but, in my judgment, the difference

between the law of rating and the income tax law is that in the Statute of Elizabeth there is no definition of "occupier," and therefore occupation has to be treated as a question of fact, whereas in the rules to which I have alluded in the Income Tax Act of 1918 there is the definition in r. 2, which provides that a certain person shall be deemed to be the occupier, and r. 4, which provides that the tax shall be charged on all lands whether occupied at the time of assessment or not, from which it appears to me that although a person is not an occupier in fact, he may be deemed to be the occupier if he has the use of the lands, and therefore that he may have the use of the lands although he does not occupy them in fact. The only other case which it is necessary for me to refer to is the case of *Hill v. Gregory* (8), which was also decided by HAMILTON, J., as he then was. It was a case in which a landlord had let the surface of this land to a farmer, and also leased the minerals subjacent to a company for the purpose of being worked as a mine, and the lease provided that certain minimum payments should be made in the first four years of the lease provided the working did not produce profits larger than those minimum sums. The company, the lessee, made no entry under the lease, but when they paid the minimum rents during the first four years to the landlord they deducted income tax, but did not pay it over to the revenue authorities. An assessment was then made upon the landlord in respect of the sums which were paid to him, and he contended that he was not liable because he was not the occupier of the minerals, but that the mining company was the occupier of the minerals. HAMILTON, J., at p. 46, said this :

Now it has been argued by Mr. Danckwerts [Mr. Danckwerts appearing for the landlord] that on the contrary the appellant is not in possession at all [the landlord was the appellant] . . . and that possession, at least constructive possession, of the minerals is in the Warwickshire Coal Company, and that, therefore, the appellant cannot be brought within Case No. II, r. 6, whatever might be the case with regard to the Warwickshire Coal Company.

The rules were substantially the same form as they are now since 1918.

Further, it is said if the case be placed under the first or general rule, which is to be construed to extend to all lands, tenements, and hereditaments capable of actual occupation of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II and No. III of this schedule, then again, because the Warwickshire Coal Company are in possession they and not the appellant are the persons who should have been charged, under case IX, rr. 1 and 2. Now, it appears to me that the facts as found by the commissioners prevent me from saying that in the ordinary sense of the word the Warwickshire Coal Company are occupiers of these minerals at all. There is not only no finding that they have ever entered upon the subject-matter of this demise, but I can only read the finding as negating that view. Then it is said, nevertheless, though they have never entered, they may be within the definition of occupiers for the purposes of this Act, for, although they have never entered upon the minerals under the land demised by the appellant, they have in contemplation of law entered

upon them by entering on minerals subjacent under land which they own themselves. Case IX, r. 2 is: "Every person having the use of any lands or tenements shall be taken and considered, for the purposes of this Act, as the occupier of such lands or tenements." [This is the corresponding rule to No. VII, r. 2.] I do not think those words mean that every person who is entitled by a demise to have the use when he chooses to enter and take that use, is to be deemed to be the occupier, and the authority which Mr. Danckwerts referred to, the *Ystradyfodwg and Pontypridd Main Sewerage Board v. Bensted* (9), appears to me rather to negative than to support that argument, and that the person in whom these minerals were vested and who, up to the time in question, has continued to have them vested in him, was the occupier in contemplation even of that. But it seems to me sufficient to say that the Warwickshire Coal Company is not, in my view, brought within the second rule of that case, and is not, in fact, as found by the commissioners, brought within the first rule of that case, and accordingly, as it seems to me, the argument against the case falling within sched. A fails, I think the case really falls within case 2, r. 6 and that the appellant was chargeable, under that rule.

I have had some doubt as to whether I ought to consider myself bound by this decision to hold, contrary to my own opinion, that the construction contended for by the appellant ought to be given to No. VII, r. 2, but I have come to the conclusion that the case of *Hill v. Gregory* (8) is properly distinguishable from the present case on the grounds that HAMILTON, J., was there basing his decision on this part of the case upon the fact that the minerals in question were still vested in the appellant, the landlord, and that there having been no entry on the part of the lessees under the mineral lease, the lessees did not fall within the terms of r. 2, and, secondly, the consideration which is not expressly referred to by HAMILTON, J., but which I think is material, that in the circumstances where a lease had been granted but no entry taken place, it was reasonable to consider, and was right to consider, that the hereditament which would be created by the lease had not then been created, and that the minerals therefore remained as part of the land, and that any profits which the owner of the land derived from them arose from the land within the meaning of the appropriate rules of the Income Tax Acts. I therefore am of the opinion that it would not be right for me to adopt in the present case the construction of rr. 2 and 4 which seems to me to be in conflict with the true interpretation of the Act on account of this case of *Hill v. Gregory* (8). My judgment, therefore, is that the appellant was the occupier of the lands and woods surrounding Abington Hall, although in fact neither he nor anyone else made any use of them during the years in question. There is a subsidiary point upon which I think the case ought to be remitted to the commissioners, and it is as to the amount of the assessment which ought to be made upon these lands. The assessment which was made was, as I understand it, the same assessment that had been made before Dec. 2, 1933, when the appellant vacated the mansion. It was divided into two parts, one part dealing with the house and

buildings which were assessed at £185, and the other, the lands, woods and plantations, which were assessed at £63. As I say, I understand it was the same assessment as had been put upon the lands and woods whilst the appellant was living at the mansion-house. Now it appears to me that though the appellant may remain the occupier for the purposes of income tax in the circumstances which have taken place, where he has taken his furniture out of his house, has left the house, and has left the grounds, that the annual value of those grounds and plantations may be something very different from what it was to a person who used the house and the grounds in conjunction, and it appears to me that this point was raised before the commissioners by para. 3 (c) of the contentions in the words :

That the lawns, gardens, drives and groves could not be let without the house, not even for grazing, and consequently, there could be no profits or gains chargeable to income tax, and that in fact there were not, and could not be, any profits or gains.

That question having been raised in that form the commissioners, who had before them this difficult and important question of law as to whether the appellant was the occupier in the circumstances, framed their decision in these words, para. 6 :

We held that the appellant was properly chargeable to income tax under scheds. A and B as being the person who was the occupier of the property within the meaning of the Income Tax Acts, and that the property was assessable to income tax whether or not the occupier chose to exercise his right of occupation.

That was all the commissioners said, and I think it would be fair and proper that the case should be remitted to them for the purpose of their considering whether there should not be any variation in the assessment of the lands and woods having regard to the fact that they are occupied without the house or that the appellant is to be deemed the occupier although he is in fact making no use of the lands and woods. It seems to me *prima facie* the assessment would be something different from what it was before, and it ought to be considered by the commissioners. The matter will, therefore, go back to the commissioners upon that basis and the appeal will be dismissed.

Solicitors : *Julius Bertram* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondent).

[Reported by LESLIE CARNEGIE, Esq., Barrister-at-Law.]

LOVIBOND v. GRAND TRUNK RAILWAY COMPANY OF CANADA AND OTHERS.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Maugham, Sir George Rankin), **May 14, 1936.**]

Companies—Share register—Allegation of improper removal of name—Action for damages for wrongful removal.

Crown Practice—Petition of right—Shares transferred by statutory authority to Crown—Action for rectification of register.

Privy Council—Canada—Ontario—Appeal as of right—Privy Council Appeals Act (R.S.O., 1927, c. 86), s. 1.

The appellant was the registered holder of certain preference and common stock of the Grand Trunk Railway Co. of Canada. By virtue of legislation and orders in council, the whole of such stocks were vested in the Minister of Finance of Canada in trust for His Majesty. A new company called the Canadian National Railway Co. having been incorporated to amalgamate an old company of that name and the Grand Trunk Co., the Minister surrendered the stocks in question to the new company for cancellation and received from the new company one share for the value of the stock surrendered. The appellant claimed on behalf of himself and all other holders of such stocks that the legislation, orders in council and agreements, whereby the above transaction was carried through were invalid and void, and asked for the rectification of the register of the Grand Trunk Co. He also claimed damages against the railway companies for breach of duty in removing his name from the register of the Grand Trunk Co. The question was also raised whether this appeal was a mere question of jurisdiction and procedure, or whether there was a matter in controversy exceeding in value 4,000 dollars and thus giving an appeal as of right to the Privy Council. The damages claimed were greatly in excess of 4,000 dollars :—

HELD : (i) the first claim was a claim against the Crown and could only be prosecuted by petition of right, and the Exchequer Court of Canada had exclusive jurisdiction in such a matter.

(ii) the claim for damages was not against the Crown, and as to that the action should be allowed to proceed.

(iii) the matter in controversy was a matter exceeding 4,000 dollars in value and the appeal lay as of right to His Majesty in Council under Privy Council Appeals Act (R.S.O., 1927, c. 86), s. 1.

[EDITORIAL NOTE.] This case raised, but only to be left undecided, how far an action can be brought against the assignee of the Crown where the Crown's title arises by judicial record and by legislative enactment. Here there was no assignee of the property as it was still held in trust for the Crown, so that this interesting question, though mentioned at some length, is left undecided. The distinction, however, taken between the action in respect of the property and the claim for damages against the railway company is interesting and important, and leaves it possible in such cases for the remedy by petition of right to be avoided. The third matter on the necessity for leave to appeal is equally important. An appeal merely raising questions of jurisdiction and procedure may be had of right where the claim is for a sum or for damages exceeding the statutory limit. It is not true to say in such a case that there is no controversy of a pecuniary nature.

AS TO PETITIONS OF RIGHT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 688-692, paras. 1176, 1177; and FOR CASES, see DIGEST, Vol. 16, pp. 236-238, Nos. 317-335. AS TO APPEALS FROM ONTARIO TO THE PRIVY COUNCIL AS OF RIGHT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 223, 224, para. 432; and FOR CASES, see DIGEST, Vol. 17, p. 487, No. 502.]

Cases referred to :—

- (1) *A.-G. for Ontario v. McLean Gold Mines, Ltd.*, [1927] A.C. 185 ; Digest Supp.
- (2) *Sadlers' Case* (*Warden & Commonalty of*) (1588), 4 Co. Rep. 54b ; 23 Digest 349, 4164.
- (3) *Cottam v. Eastern Counties Ry. Co.* (1860), 1 John. & H. 243 ; 10 Digest 772, 4831.
- (4) *Barton v. London & North Western Ry. Co.* (1888), 38 Ch. D. 144 ; 10 Digest 1144, 8091.
- (5) *Sloman v. Bank of England* (1845), 14 Sim. 475 ; 3 Digest 125, 21.
- (6) *Midland Ry. Co. v. Taylor* (1862), 8 H.L.Cas. 751 ; 9 Digest 389, 2465.
- (7) *Barton v. North Staffordshire Ry. Co.* (1888), 38 Ch. D. 458 ; 10 Digest 1143, 8083.
- (8) *Re Bahia & San Francisco Ry. Co.* (1868), L.R. 3 Q.B. 584 ; 9 Digest 389, 2466.
- (9) *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618 ; 9 Digest 382, 2423.
- (10) *Raleigh v. Goschen*, [1898] 1 Ch. 73 ; 38 Digest 63, 379.
- (11) *Feather v. R.* (1865), 6 B. & S. 257 ; 38 Digest 64, 391.
- (12) *Dyson v. A.-G.*, [1911] 1 K.B. 410 ; 11 Digest 524, 292.
- (13) *Burghes v. A.-G.*, [1911] 2 Ch. 139 ; 30 Digest 144, 197.
- (14) *Esquimalt & Nanaimo Ry. Co. v. Wilson*, [1920] A.C. 358 ; 11 Digest 527, 317.
- (15) *McGregor v. Esquimalt & Nanaimo Ry. Co.*, [1907] A.C. 462 ; 17 Digest 441, 172.

APPEALS from the Court of Appeal of Ontario. The nature of the consolidated appeals and the history of the proceedings are fully set out in the judgment.

Cyril Radcliffe, K.C., Evan Gray, K.C. (of the Canadian Bar), and *Horace Douglas*, for the appellant.

W. N. Tilley, K.C., and F. P. Varcoe, K.C. (both of the Canadian Bar), for the respondents.

Radcliffe, K.C. : The necessity to proceed by petition of right was said in the court below to be governed by *A.-G. for Ontario v. McLean Gold Mines, Ltd.* (1). There are differences between that case and the present one. The nature of the rights of a person to have his name restored to the register from which it has been improperly removed are dealt with in *Sloman v. Bank of England* (5) and *Midland Ry. Co. v. Taylor* (6). The right of the plaintiff here is wholly between himself and the Grand Trunk Ry. Co. and the parties who had acquired the stock from that company are not necessary parties to the action (*Barton v. L. & N.W. Ry. Co.* (4)). If it is proved that the authority for the transfers from the Grand Trunk Co. did not exist, the government had no right to order the company to effect the transfers, and if the amalgamation of the companies was completely bad, the proper company to be sued was the Grand Trunk Co. Even if the Crown is a necessary party, it can be represented by the Attorney-General and it is not essential that a petition of right should be brought. There is an alternative form of remedy which involves an order on the transferees (*Cottam v. Eastern*

Counties Ry. Co. (3)). The appellant has not in this case pursued that remedy. If *Barton v. North Staffordshire Ry. Co.* (7) is right, the present claim founded on the refusal to put the appellant back on the register is sufficient to recover damages. If the Grand Trunk Acquisition Act of Canada which gave power to pass the Order in Council of Jan. 19, 1923, was *ultra vires*, there was no power to make such an order. The nature of the claim here is a claim against the Grand Trunk Co. (*Re Bahia & San Francisco Ry. Co.* (8) and *Re Ottos Kopje Diamond Mines, Ltd.* (9)). If a subject alleges the authority of the Crown to justify an act, that authority must be considered by the court as to whether it is a valid authority or not (*Raleigh v. Goschen* (10)) and that is the real point here (*Feather v. R.* (11)). In so far as this action impugns the title of the Crown, a petition of right is not necessary. It will suffice if the Attorney-General be joined. He is the proper party to represent the Crown where no order is asked for against the Crown (*Dyson v. A.-G.* (12); *Burghes v. A.-G.* (13); *Esquimalt & Nanaimo Ry. Co. v. Wilson* (14)). The appellant cannot obtain his proper remedy by petition of right, since in that proceeding he cannot bring in the company. The substance of the action must be regarded, and in substance this action is against the Crown.

Tilley, K.C. : In a properly framed action the Grand Trunk Ry. Co. can be made responsible for allowing wrong persons to be registered and acquire rights, but this action is for the restoration of stock by that company which the appellant alleges has been transferred to the Crown. The action as framed discloses claims for declarations and damages based on the invalidity of statutes and orders under which the Crown took title. Such claims cannot be litigated in the absence of the Crown and must be by petition of right, the Crown being a party to the impugned transaction. That was the effect of *A.-G. for Ontario v. McLean Gold Mines, Ltd.* (1). The declarations the appellant asks for must be entirely discretionary and the court will not in the exercise of its discretion grant declarations affecting the Crown's title at the instance of a plaintiff whose cause of action is founded on actual damage. The present claim must fail (*McGregor v. Esquimalt & Nanaimo Ry. Co.* (15); *Esquimalt & Nanaimo Ry. Co. v. Wilson* (14); *Sadlers' Case* (2)).

The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN.

LORD RUSSELL OF KILLOWEN : These are two appeals by special leave. By his first appeal George Pardew Lovibond seeks to reverse an order, dated June 28, 1933, of the Court of Appeal of Ontario which dismissed his appeal from the judgment of KERWIN, J., pronounced on Feb. 24, 1933, in an action in which he was the plaintiff. Before stating the terms of that judgment it will be convenient to outline the

relevant facts leading up to the issue of the writ, as those facts are set out, or involved in the allegations contained, in the statement of claim.

The Grand Trunk Railway Company of Canada (hereinafter referred to as the Grand Trunk) was incorporated in the year 1852 by special Act of the legislature of the old Province of Canada. Its issued capital stock consisted (in addition to £12,500,000 4 per cent. guaranteed stock) of preference and common stock (hereinafter referred to as the junior stocks) of an aggregate nominal value of £37,073,492. In addition there were issued and outstanding debenture stocks of the Grand Trunk exceeding £31,000,000. By an Act of the Parliament of Canada (viz., the Grand Trunk Railway Acquisition Act, 1919), the Minister of Railways and Canals of Canada was authorised to enter into an agreement with the Grand Trunk for the acquisition by the government of the junior stocks of the Grand Trunk subject to certain terms and conditions to be embodied in an agreement between the Government of Canada and the Grand Trunk. The agreement was to be submitted for the approval of a meeting of all the stockholders of the Grand Trunk including holders of the debenture stocks and guaranteed stocks. The Act also provided that the Governor in Council might make such orders as were deemed requisite to vest in the government any of the junior stocks not transferred to the government or its nominees under the terms of the Act. The draft of an agreement embodying the terms prescribed by the Act of 1919 was submitted to a meeting of Grand Trunk stockholders on Feb. 19, 1920, and was approved by a majority vote of those present, or represented by proxy, at the meeting.

By an Act of the Parliament of Canada (10 & 11 Geo. V, c. 13), assented to on May 11, 1920, an agreement dated Mar. 8, 1920, executed by the officers of the Grand Trunk and by the said Minister on behalf of the Government of Canada and scheduled to the Act was confirmed and ratified. By that agreement the Grand Trunk undertook and agreed to use its best endeavours to cause the sale and delivery to the Government of Canada, and the government agreed to acquire the junior stocks of the Grand Trunk: the value, if any, to the holders thereof was to be determined by a board of three arbitrators subject to a maximum limit of some \$64,000,000: new guaranteed stock to the value of the junior stocks as so determined was to be distributed among the holders of the junior stocks upon the transfer to or vesting in the government or its nominees of the junior stocks; and any shares or any part of the junior stocks not transferred to the government in exchange for the new guaranteed stock might be declared to be the property of the Minister of Finance in trust for His Majesty, and upon the making of such declaration such stock not so transferred should immediately become the property of His Majesty and entries thereof in the stock registers and other books in that behalf should be made.

Arbitration proceedings having been held, two of the arbitrators by a majority award found that there was no value to the holders thereof in the junior stocks of the Grand Trunk. The third arbitrator was of opinion that their value was not less than \$48,000,000.

On Jan. 18, 1923, the appellant's name appeared on the stock register of the Grand Trunk as the registered holder of £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1,100 Common Stock.

By an Order in Council, approved by the Governor-General on Jan. 19, 1923, it was declared that the whole of the junior stocks of the Grand Trunk were the property of the Minister of Finance in trust for His Majesty, and it was directed that entries thereof in stock registers and other books of the Grand Trunk in that behalf should forthwith be made. In pursuance thereof some officer, servant or agent of the Grand Trunk entered on the stock register of the Grand Trunk a transfer of the junior stocks to the Minister of Finance.

Subsequently an amalgamation took place between the Canadian National Railway Company (a company incorporated in the year 1919 by special Act of the Parliament of Canada (9 & 10 Geo. V, c. 13) and hereinafter referred to as the old Canadian National) and the Grand Trunk, as a result of which a company came into existence which also was called the Canadian National Railway Company and which is hereinafter referred to as the new Canadian National. By the amalgamation agreement (dated Jan. 30, 1923) it was amongst other things provided that the amount of the capital stock of the new Canadian National should be the equivalent in Canadian money at \$4.86 $\frac{2}{3}$ to the pound sterling of £37,073,492 the total of the junior stocks of the Grand Trunk, and that the said capital stock should be issued in one share of the face value of \$180,424,327.70 to the Minister of Finance in trust for His Majesty; and that upon such issue the shares held by the Minister of Finance in trust as aforesaid in the capital stock of the Grand Trunk should be surrendered by the Minister of Finance to the new Canadian National for cancellation. By an Order in Council approved by the Governor-General on Jan. 30, 1923, this agreement was approved and it was provided that the Minister of Finance should be registered on the books of the new Canadian National as the holder in trust for His Majesty of the said share of its stock, and that upon such registration being made he might surrender to the new Canadian National the junior stocks of the Grand Trunk.

On Jan. 17, 1929, the appellant presented a petition of right seeking a declaration that the junior stocks of the Grand Trunk remained and were still vested in the several persons in whom they were respectively vested immediately before the said Order in Council of Jan. 19, 1923, or in the respective legal personal representatives of such of the said

persons as were then dead. The claim to this relief was based upon allegations that the various Acts of Parliament, Orders in Council and agreements hereinbefore mentioned were *ultra vires*, illegal and void. The necessary fiat was however refused by the Governor-General in Council; and an application to His Majesty in Council for special leave to appeal from this decision was refused.

Thereafter, viz., on Nov. 27, 1931, the appellant took transfers of certain amounts of the various denominations of the junior stocks from (1) one Elizabeth Marion Lovibond and (2) one Henrik Loeffler. On the same day he presented these transfers with the relevant certificates for entry on the registers of the Grand Trunk in London, but was advised that the registers had been closed and that the transfers could not be registered in London. He then, on Dec. 16, 1931, caused them to be delivered to the secretary of the Canadian National (but whether the old company or the new company is not clear) and the Grand Trunk, with the request that the transfers should be entered in the proper stock registers of the Grand Trunk and new certificates issued. On the same day he submitted to the President of the Canadian National (but whether the old company or the new company is not clear) and the Grand Trunk, a demand for rectification of the stock register of the Grand Trunk by restoring his name as the registered holder of the stock of which he was the registered holder on Jan. 18, 1923, or in the alternative that the Grand Trunk or the Canadian National (but whether the old company or the new company is not clear) should appropriate or acquire £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1,100 Common Stock of the Grand Trunk and transfer and register the same in the books of the Grand Trunk in his name as the holder thereof. Neither the request nor the demand made by him on Dec. 16, 1931, was complied with; and accordingly he issued the writ in the present action on Dec. 26, 1931. He is the only plaintiff, but he sues "on behalf of himself and on behalf of himself and all others the registered holders on Jan. 18, 1923, of first, second and third preference stocks and of common stock of the Grand Trunk Railway Company of Canada their personal representatives or assigns." The defendants are the Grand Trunk, the Canadian National Railway of Canada and the Attorney-General of Canada.

By his statement of claim he states either in terms or inferentially the facts already narrated, and alleges as to each Act of Parliament, Order in Council and agreement that it is invalid, illegal and void. From para. 3 of the statement of claim it would appear that the defendant the Canadian National is the old company, and in para. 5 it is stated that the Attorney-General is joined for the purpose of the declarations asked for in para. 32 (b) (e) and (f).

Para. 32 sets out in detail the relief claimed. It runs thus :

32. The plaintiff, therefore, claims on behalf of himself and all those whom he represents in this action :

(a) a declaration that the transfers, to the Minister of Finance, of the stock of the Grand Trunk registered, on Jan. 18, 1923, in the name of the plaintiff and in the names of those whom he represents in this action, are invalid, illegal and void, and an order directing the defendants Grand Trunk and Canadian National to rectify the stock register of the Grand Trunk in accordance with such declaration ; and

(b) a declaration that the Grand Trunk Railway Acquisition Act, 1919 (10 Geo. V, c. 17) and in particular sects. 2, 6, 7, 8, 9 and 10 thereof, are *ultra vires* the Parliament of Canada ; and

(c) a declaration that the general meeting of stockholders of the Grand Trunk held in London on Feb. 19, 1920, was not duly constituted and that the resolution of that meeting purporting to ratify or approve the agreement of Mar. 8, 1920, is *ultra vires*, invalid and void ; and

(d) a declaration that the agreement dated Mar. 8, 1920, between the Government of Canada and the Grand Trunk is *ultra vires*, invalid and void ; and

(e) a declaration that the Act of 1920 (10 & 11 George V, c. 13), being an Act to confirm the agreement of Mar. 8, 1920, and in particular sects. 1 and 2 thereof are *ultra vires* the Parliament of Canada ; and

(f) a declaration that the Order in Council approved by His Excellency the Governor-General on Jan. 19, 1923, is not within the authority conferred upon His Excellency by the Grand Trunk Acquisition Act, 1919, and is otherwise *ultra vires*, illegal and void ;

And the plaintiff also claims, on his own behalf :

(g) an order directing the defendants Grand Trunk and Canadian National to rectify the stock register of the Grand Trunk by restoring the name of the plaintiff as the registered holder of £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1,100 Common Stock of the defendant Grand Trunk of which stock the plaintiff was the registered owner on Jan. 18, 1923 ; or

(h) an order directing the defendants Grand Trunk and Canadian National to appropriate or acquire £100 First Preference Stock, £100 Second Preference Stock, £700 Third Preference Stock and £1,100 Common Stock of the defendant Grand Trunk and to transfer and register the same in the books of the defendant Grand Trunk in the name of the plaintiff as the holder thereof ; or

(i) in the alternative, damages in the amount of \$9,733.33, for the refusal or failure of the defendants Grand Trunk and Canadian National to obtain and register such stock, or cause the same to be obtained and registered in the name of the plaintiff ; and

(j) damages in the amount of \$4,379.95 for the unlawful acts of the defendants Grand Trunk and Canadian National in registering the invalid transfer referred to in clause (a) of this paragraph and in depriving the plaintiff of the rights and privileges of ownership of such stocks without lawful authority ; and

(k) an order directing the defendants Grand Trunk and Canadian National to register the plaintiff, or cause him to be registered, in the books of the defendant Grand Trunk as the holder of £1,200 of First Preference Stock, £1,100 of Second Preference Stock, £1,700 of Third Preference Stock and £1,900 of Common Stock of the defendant Grand Trunk assigned to the plaintiff by transfers of stock dated Nov. 27, 1931, made by Mrs. Elizabeth Marion Lovibond and Captain Henrik Loeffler ; or

(l) in the alternative, damages in the amount of \$28,713.33 for the refusal or

failure of the defendants Grand Trunk and Canadian National to register such stock or cause the same to be registered in the name of the plaintiff; and

(m) damages in the amount of \$12,920.95 for the unlawful acts of the defendants Grand Trunk and Canadian National in registering the invalid transfers referred to in clause (a) of this paragraph and in depriving the plaintiff of the rights and privileges of ownership of such stock without lawful authority;

And the plaintiff also claims on behalf of himself, and on behalf of himself and all others whom he represents in this action:

(n) such further and other relief as may seem just and equitable to this Honourable Court; and

(o) the costs of this action.

A motion for an order staying or dismissing the action on the ground (amongst others) that the plaintiff's claim could only be asserted by petition of right having failed on the ground that that question ought to be left to be decided at the trial, a defence was delivered. Paras. 23, 24 and 25 thereof are in the following terms:

23. The plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right.

24. The Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action.

25. An action by the plaintiff either personally or in his representative capacity for the declarations referred to in para. 5 of the statement of claim will not lie even though the Attorney-General of Canada be a party defendant.

A reply was delivered by the plaintiff in para. 11, of which it was pleaded:

11. The plaintiff denies the allegation in para. 23 of the statement of defence and says that the stock the ownership whereof is in question in this action is now held by the Canadian National.

An order was subsequently made for the points of law raised by paras. 23, 24 and 25 of the defence to be set down for hearing before the trial of the action, and they were set down and argued accordingly before KERWIN, J., who on Feb. 24, 1933, made an order which so far as material was in the following terms:

and this court having directed that the motion be turned into a motion for judgment.

2. This court doth declare that the plaintiff's claim impugns the title acquired by the Crown to the preference and ordinary stocks of the Grand Trunk and cannot be maintained by action but only by petition of right as alleged in para. 23 of the statement of defence herein and doth order and adjudge the same accordingly.

3. And this court doth further declare that the Exchequer Court of Canada has exclusive original jurisdiction to determine the matters in question in this action as alleged in para. 24 of the statement of defence herein and doth order and adjudge the same accordingly.

4. And this court doth not see fit by reason of the declarations aforesaid to make any declaration with respect to para. 25 of the statement of defence herein.

5. And this court doth further order and adjudge that this action be and the same is hereby dismissed with costs to be paid by the plaintiff to the said defendants

forthwith after taxation thereof, including the costs of the motion referred to in the said order of the Honourable the CHIEF JUSTICE of the High Court dated Jan. 14, 1933.

The learned judge was of opinion that in order to succeed in any part of his claim the plaintiff must establish that the Crown never obtained title to the junior stocks, and that even though the Crown had ceased to own or be in possession of the property in question, the subject could only proceed by petition of right, if his claim depended on establishing the invalidity of the title which the Crown had at one time acquired. For this proposition he relied upon a judgment of this Board in the case of *A.-G. for Ontario v. McLean Gold Mines, Ltd.* (1). The learned judge thought that para. 24 of the defence merely referred to the machinery by which the plaintiff might have a petition of right disposed of; and he expressed no opinion in regard to para. 25.

An appeal by the plaintiff from the order of KERWIN, J., to the Court of Appeal of Ontario was on June 28, 1933, dismissed with costs. The CHIEF JUSTICE OF ONTARIO expressed his views in the following words:

It thus appears from the statement of claim that the stock in question has been transferred to the Minister of Finance in trust for His Majesty represented by the Government of Canada; that the plaintiff contends that such transfer is illegal and should be so declared. The plaintiff is not entitled to impugn the title of the Crown in this stock by action but only by petition of right. (*A.-G. for Ontario v. McLean* (1)). Therefore this appeal should be dismissed with costs.

The CHIEF JUSTICE IN APPEAL took the same view. He said:

Here, as in the *McLean* case (1) the plaintiff cannot succeed until he extinguishes the title of the Crown, and that can be done only under proceedings by petition of right.

RIDDELL, J.A., also relied on the *McLean* case (1), but as it seems to their Lordships he attributed to it a wider scope than the two Chief Justices appear to have done. They both treated the *McLean* case (1) as justifying them in holding that proceedings by petition of right were the only proceedings available when the relief sought involved the putting an end to an existing title of the Crown. The CHIEF JUSTICE OF ONTARIO treats the junior stocks as standing in the name of the Minister: "the stock in question," he says, "has been transferred to the Minister of Finance." The CHIEF JUSTICE IN APPEAL speaks of the "extinguishment" of the Crown's title. RIDDELL, J.A., goes further, for he said: "If the Crown ever owned the stock, the plaintiff has no standing to assert in any court that he has any rights by reason of his ownership thereof": and, making the assumption in the plaintiff's favour that the Crown had transferred the stock to a third person, he held that upon the authority of the *McLean* case (1) no proceedings except by petition of right were open to the plaintiff. MIDDLETON, J.A., seems to have taken the same view, as did also MASTEN, J.A.

The plaintiff has now appealed to His Majesty in Council; and in the argument addressed to their Lordships' Board has contended (*a*) that the *McLean* case (1) has no application to his action, since it is merely an action which seeks to enforce the rights of stockholders against the Grand Trunk for breach of duty in removing the names of the stockholders from the stock register without their authority or consent; (*b*) that the fact that the authority for the removal was the Crown's authority (*viz.*, the Order in Council of Jan. 19, 1923) does not debar the courts from inquiring into and adjudicating upon the validity of that authority; (*c*) that a subject is entitled to sue to recover property not in the ownership or possession of the Crown notwithstanding that the defendant's title is derived from or through the Crown; (*d*) that if the *McLean* case (1) decided that whenever a subject's claim to property depended upon or involved the establishment of the invalidity of a title which was formerly but was no longer vested in the Crown, the claim could only be the subject of petition of right, then the decision was erroneous and should not be followed; but (*e*) that in the case described the subject's claim could be asserted by action provided that (as in the present case) no claim was made to relief against the Crown, and no order was sought against the Crown or the Crown's servants.

Their Lordships have had their attention called to certain authority in favour of the third and fifth of the above contentions. Thus in *CLODE ON PETITION OF RIGHT* (p. 105), after the statement that so long as property wrongfully seized is detained by the Crown the subject's remedy is by petition it is stated, citing *STAUNFORD'S PREROGATIVE* :

It may be, however, that after the wrongful seizure the Crown grants the land over by letters patent to another; in such a case there seems to be no necessity for the party grieved to bring his petition against the Crown, since he can recover possession of the land from the king's patentee as a trespasser by the appropriate common law remedy; "and the reason of this is because that when his highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it, but by petition for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is mine assize revived, for now the patentee entereth by his own wrong and intrusion and not by any title that the king giveth him, for the king had never title ne possession to give in that case. And this appeareth in M. 4, Ed. IV, f. 21 & 25, and M. 24, Ed. III, f. 64, and Travers 34 & 35. Like law is it if I have a rent-charge out of certain land, and the tenant of the land enfeofeth the king by deed enrolled; now during the king's possession I must sue by petition, but if his highness enfeofe a stranger I may distrain for my rent upon a stranger; and so it is in the cases before, where a man may have his 'traverse' or 'monstrans de droit': if the lands be once out of the king's hands the party then may have his remedy that the common law giveth him, for in all these cases a petition did lye only for the dignity of his person and not for the right that he had to the possession of the thing." *STAUNFORD'S PREROG.* Chap. xxii, fol. 74b, 75a.

Again at p. 107 occurs the following passage :

There is, however, another fact which should be noticed in connection with this branch of the subject. We have seen that where the king's wrongful title is by matter "in pais," if he grant over his interest, the party grieved is not put to his petition, but can recover at common law against the patentee; this does not seem to be the case "when the king's title accrues to him by a judicial record, or as GASCOIGNE (9 H. 4) says by judgment of record; there although the king grants all his estate over, yet the party grieved was put to his petition, and should have 'scire facias' against the patentee, as in case of attainder recovery, etc."

In support of STAUNFORD's opinion the learned author refers (among other authorities) to the case of the *Warden and Commonalty of Sadlers* (2).

In CHITTY ON THE PREROGATIVES OF THE CROWN (at pp. 342, 343) the same passage from STAUNFORD is cited.

None of this authority seems to have been cited to, or considered by, the Board in the *McLean* case (1), and their Lordships would not, as at present advised, desire to say that it was the intention of the Board in that case to depart from this authority: more particularly since the judgment may well be open to the construction that the decision was in fact based upon a view that part of the relief claimed, viz., the cancellation of the certificates of forfeiture involved the taking away of something from the Crown; for it is to be observed that success by the plaintiffs would have deprived the Crown in that case of the benefit of certain reservations in the Crown's favour made on the occasion of the grants which the plaintiffs were seeking to avoid. Further, the Crown would have been deprived of its right or chance of forfeiting the lands against its new grantee. But however this may be, in the view which their Lordships take of the real nature of the plaintiff's principal claim in the present case as disclosed in his statement of claim, it is unnecessary to pronounce a final opinion upon the question whether the decision in the *McLean* case (1) necessarily involves the proposition that the mere fact that a subject's claim to property (which though formerly is no longer in the ownership or possession of the Crown), necessitates attacking the validity of a title formerly claimed to be in the Crown, prevents that claim from being asserted otherwise than by petition of right.

Their Lordships feel no doubt that the main object of the relief which the plaintiff claims is the recovery for himself and the other former holders of the junior stocks of the stocks which were formerly standing in their names, but which were subsequently put into the name of the Minister of Finance and held by him in trust for the Crown. So far as the allegations in the statement of claim are concerned, the junior stocks are still in the Minister's name, and the orders claimed in para. 32 (a), (g), (h), (k) could only be granted by taking stock away from the Crown's trustee. Such relief can only be obtained by the subject on petition of right. Even if the allegation made in para. 11 of the reply be treated as incorporated in the statement of claim, the position remains in their

Lordships' opinion the same. The Canadian National (whether the old or the new) has no beneficial interest in the stock ; if it did get it, it was only received for the purpose of terminating its existence. The only person who, if the stock still exists and the plaintiff's claim succeeds, would be deprived of the stock and any beneficial interest therein, would be the Crown. Their Lordships are accordingly of opinion that the orders of KERWIN, J., and the Court of Appeal were right in so far as they operated to prevent the plaintiff from seeking by action to obtain the orders on the Grand Trunk and the Canadian National claimed by para. 32 (a), (g), (h) and (k) of the statement of claim.

The order of KERWIN, J., however, goes much further in its operation ; it dismisses the action. Now the action also seeks relief by way of damages against the defendant companies, founded upon some alleged breach of duty in removing the name of the plaintiff from the stock registers. To an action of that nature the person whose name has been substituted on the registers for that of the plaintiff need not, indeed ought not, be joined as a defendant. The claim is not for rectification of the stock register ; i.e., the relief sought is not the substitution of the plaintiff on the register as owner of stock in the place of some other person ; to proceedings which seek to enforce such a claim as that, that other person would be a necessary party. The claim is merely one in the nature of a claim for damages ; and to an action to enforce such a claim, he is not a proper party. *Cottam v. Eastern Counties Railway Company* (3) may be referred to as an instance of a rectification claim ; and *Barton v. London and North Western Railway Co.* (4) may be referred to as a case in which no rectification was claimed, but in which the relief sought and obtained was in the nature of damages against the railway company.

Their Lordships see no ground upon which this claim by the plaintiff for damages, for what it may be worth, can be prevented from proceeding against the defendant companies, notwithstanding that the plaintiff's title to any relief may ultimately turn out to depend upon the invalidity of the impeached Acts of Parliament and Orders in Council. There is nothing in this fact which prevents the plaintiff from asserting by action his claim against a fellow subject for damages. Their Lordships are of opinion that in this respect the action must be allowed to proceed.

There remains for consideration that part of the relief claimed which seeks to obtain declarations. These are sought as foundations upon which to base the claims to have the names of the old holders of the junior stocks restored as such to the register of the Grand Trunk : in other words, they are ancillary to the claims which can only be the subject of a petition of right. The action cannot be allowed to proceed in regard to them ; and as the Attorney-General is only sued for the purpose of the declarations asked for in para. 32 (b), (e) and (f) of the statement of claim, the

action should no longer proceed against him as a party. If the action proceeds to trial on the question of damages, and if it becomes necessary to determine the validity of any legislation of the Parliament of Canada, the presence and assistance of the Attorney-General for Canada and the Attorney-General of Ontario can be obtained at a later stage under the Ontario Judicature Act (R.S.O. 1927, c. 88), s. 32. In the view which their Lordships take, it is unnecessary for them to express any opinion in regard to the questions raised in paras. 24 and 25 of the defence.

The question raised by the second appeal is a short one, but it has revealed considerable divergence of judicial opinion. It is whether the appellant was entitled as of right to appeal to His Majesty in Council from the order of the Court of Appeal of Ontario dated June 28, 1933; and the answer depends upon whether this appeal is covered by the words "where the matter in controversy in any case exceeds the sum or value of 4,000 dollars" within the meaning of the Privy Council Appeals Act of Ontario (R.S.O. 1927, c. 86), s. 1. On the one hand it is said that the question for consideration on the appeal is a question of procedure or jurisdiction, and that there is no controversy of a pecuniary nature. On the other hand, the contention is that the true test is what is at stake on the appeal, that what is at stake is the plaintiff's right to continue proceedings in which he is claiming damages far in excess of 4,000 dollars, and that accordingly that this is a case (whether that word means "cause" or "instance") in which the matter in controversy exceeds the sum or value of 4,000 dollars. The question is now of interest in this litigation only as regards costs, owing to the fact that special leave to appeal was granted. Their Lordships, however, are of opinion that the contention of the appellants is correct, and that the plaintiff was entitled as of right to appeal to His Majesty in Council. The order of the Court of Appeal dismissed his action and as a result his claim to damages was just as effectively put an end to as if his action had been dismissed after a full trial on the merits. In either case it appears to their Lordships that for the purposes of an appeal there is a matter in controversy which exceeds the sum or value of 4,000 dollars.

The order of the Court of Appeal of Ontario dated Nov. 1, 1934, should accordingly be discharged. The effect of this will be to restore the order of MIDDLETON, J., of June 2, 1934, under which the costs of the application before him were made costs in the appeal to His Majesty in Council.

In the result their Lordships are of opinion that the first appeal should be allowed and the order of KERWIN, J., varied by striking out the paragraphs therein numbered 2, 3, 4 and 5, and by substituting for those paragraphs an order staying the action as against the Attorney-General of Canada wholly, and as against the other defendants in so far as it seeks to have the stock register of the Grand Trunk rectified or to have Grand Trunk stock registered in the name of the plaintiff, and in par-

ticular in so far as it claims the relief sought in para. 32 (a), (b), (c), (d), (e), (f), (g), (h) and (k) of the statement of claim. The second appeal should also be allowed, and the order of Nov. 1, 1934, discharged.

Their Lordships will humbly advise His Majesty accordingly.

As regards costs, the plaintiff must be ordered to pay the costs of the Attorney-General (1) of the action, (2) of the motion before KERWIN, J., which resulted in the order of Feb. 24, 1933 (including the costs of the motion referred to in an order of the CHIEF JUSTICE of the High Court dated Jan. 14, 1933), (3) of the appeal therefrom to the Court of Appeal, and (4) of the appeal to His Majesty in Council, the costs of the Attorney-General in each case being taken to be one-half of the aggregate costs of the three defendants. If the plaintiff has in fact paid the costs which he was ordered to pay by the order of KERWIN, J., by the order of the Court of Appeal of June 28, 1933, and by the order of the Court of Appeal of Nov. 1, 1934, he is to be at liberty to deduct the amount of one-half of the costs so paid from the costs ordered to be paid by him to the Attorney-General as aforesaid. As to the costs of the other defendants of the matters aforesaid numbered (2), (3) and (4), it must be remembered on the one hand that the plaintiff has been partially successful on the first appeal and wholly successful on the second appeal, but on the other hand that the plaintiff has been unsuccessful in regard to the matters to which almost the whole of the time occupied by the hearing of the appeals must be attributed. The plaintiff has failed in regard to the main object of his action, which can now only proceed for the purpose, for whatever it may be worth, of seeking to recover damages against the Grand Trunk and the old Canadian National. In these circumstances their Lordships think that justice will be done if the plaintiff be ordered to pay to the defendants other than the Attorney-General one-half of their costs of the matters above mentioned and numbered (2), (3) and (4), the costs of those defendants in each case being taken to be one-half of the aggregate costs of the three defendants. The plaintiff will accordingly pay to the defendants other than the Attorney-General one-quarter of those aggregate costs. If the plaintiff has in fact paid the costs which he was ordered to pay by the order of KERWIN, J., by the order of the Court of Appeal of June 28, 1933, and by the order of the Court of Appeal of Nov. 1, 1934, he is to be at liberty to deduct the amount of one-half of the costs so paid from the costs now ordered to be paid by him to the defendants other than the Attorney-General. Save as aforesaid their Lordships think that no order should be made either for payment of costs or for the return of costs already paid.

Solicitors : *Lawrence Jones & Co.* (for the appellant) ; *Charles Russell & Co.* (for the respondents).

[Reported by S. P. KHAMBATTA, ESQ., Barrister-at-Law.]

MASON & WOOD, LTD. v. GREENE & WIFE.

[COURT OF APPEAL (Slessor and Romer, L.JJ., and Finlay, J.), **May 14, 1936.**]

Moneylending—Memorandum of contract—Rate of interest—Moneylenders Act, 1927 (c. 21), s. 6.

The memorandum of a moneylending contract stated that there was an advance of £50 upon a promissory note for £70 and that "the amount of principal being advanced in respect of the promissory note for £70 is £50 and the interest charged of £20 is equivalent to interest at the rate of £64 per cent. per annum":—

HELD: the memorandum did not comply with the Moneylenders Act, 1927, s. 6, inasmuch as it did not state either the interest as a rate per cent. or that the rate of interest was calculated in accordance with sched. I of the Act of 1927.

[EDITORIAL NOTE.] The requirements of the Moneylenders Act, 1927, s. 6, are that the interest shall be stated as a rate per cent., not mentioning the amount of such interest, or, if the amount is mentioned, then the rate per cent. must also be stated, and it must be further stated in the latter case that the rate per cent. has been calculated in accordance with sched. I of the Act. This was decided in *Parkfield Trust, Ltd. v. Curtis* (1), but it was held in the court below that that case was not of general application, but limited to its own particular facts. It is now clear that that authority is of general application.

AS TO THE MEMORANDUM OF AGREEMENT BY MONEYLENDERS, see HALSBURY, 1st Edn., Supp. to Vol. 21, para. 91; and FOR CASES, see DIGEST Supp., Money and Moneylending, Nos. 353 (a)-353 (v). FOR THE MONEYLENDERS ACT, 1927, s. 6, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 12, pp. 230, 231.

Case referred to:

(1) *Parkfield Trust, Ltd. v. Curtis*, [1934] 1 K.B. 685; Digest Supp.

APPEAL from a decision of MACNAGHTEN, J., given on Oct. 10, 1935, in favour of the plaintiffs in an action on two promissory notes. The facts appear from the judgment of SLESSOR, L.J.

Gerson Newman for the appellants.

R. F. Levy for the respondents.

SLESSOR, L.J.: This appeal succeeds. It is an action on two promissory notes, one dated Aug. 26, 1933, for the sum of £70, repayable by fourteen consecutive instalments of £5, and a later one on Jan. 12, also for £70 similarly repayable.

Now these moneys were advanced and payments were made from time to time, and an agreed statement has been drawn up between the parties showing how much is attributable to the repayments of the amount advanced and how much is attributable to payment of interest. I do not think it necessary in the circumstances of this case to go into them in detail. The action is now brought with regard to the balance, as it is alleged, of the money owing.

It is necessary, this being a moneylending transaction, that it should

comply with the requirements of the Moneylenders Act, 1927, and particularly with sect. 6 of that Act. It is said here on behalf of the defendants that the memorandum does not comply with the Moneylenders Act, 1927, s. 6 (2), and therefore that the action cannot succeed. Now the memorandum in question, which is dated Jan. 12, 1934, is as follows, so far as it is here material. The other memorandum of Aug. 26, 1933, is to the same effect. The former says :

Note or memorandum of contract for the proposed advance to be made by you to us this 12th day of January, 1934, of the sum of £50 0s. 0d. on a joint and several promissory note for £70 0s. 0d., payable to Walter Carr, Ltd., or order at No. 16, Maddox Street, W.1, or at such other place as they may direct, by 14 consecutive monthly instalments of £5 each commencing on Feb. 28, 1934, and in the event of default in payment of any instalment or part thereof, then the said Walter Carr, Ltd., shall be at liberty at their option to demand payment of the whole of the balance of the said sum of £50 remaining unpaid together with a proportionate part of the sum of £20 charged for interest to the date of such demand and thereupon the whole of the said balance of principal and the proportionate part of the interest as aforesaid shall immediately become due and payable and such balance of the said sum and interest so remaining due as aforesaid whether in respect of principal or interest shall bear simple interest on that sum at the rate of £64 per cent. per annum from the date of such demand until payment, and until such demand to continue to pay the said monthly instalments and all moneys paid on account of the said advance and interest shall be applied firstly in payment of the interest due to that date and then to principal. The amount of principal being advanced in respect of the said promissory note for £70 is £50 and the interest charged of £20 is equivalent to interest at the rate of £64 per cent. per annum.

Now it is clear, therefore, the £64 per cent. per annum being the equivalent to interest which is said to be reached by considering the interest charged of £20 on the £50, that this is not a case where the interest is charged on the loan expressed in terms of a rate per cent. per annum. This rate is computed, as indeed it may be computed, under the Moneylenders Act, 1927, where there is no interest on the loan charged expressed in terms of a rate per cent. per annum, as calculated in accordance with the provisions of the first schedule to this Act. It is not necessary to consider that schedule ; it is sufficient to say that in this case the parties agree that the calculation in accordance with the schedule of these figures does bring out a rate, as is stated, equivalent to interest at the rate of £64 per cent. per annum. But it is objected here by the appellants that the memorandum is not sufficient because, while it does say that the sum of £50 and interest charged at £20 is equivalent to interest at the rate of £64 per cent. per annum, it does not go on to say that that sum is represented by the interest charged as calculated in accordance with the provisions of the first schedule to this Act.

Now, in my opinion, this question has been decided by authority and the authority of this court, in the case of *Parkfield Trust, Limited* v.

Curtis (1). It is true, as MACNAGHTEN, J., points out in his judgment in this case, that the facts of that case and the immediate problem there to be considered were different in some respects from the present case. In that case there was an agreement to lend a sum of £500 in consideration of the additional sum of £150, the whole sum of £650 to be repaid by two instalments of £325 each, paid at the end of the first and second months. In the memorandum of the contract the loan was stated to be payable with interest at the rate of £240 per cent. per annum to be made upon the terms of the promissory note of that date. The promissory note contained a promise to pay £500 together with interest at the rate of £240 per cent. per annum, such sum of £500 to be paid together with interest then due by consecutive monthly instalments of £325 each. It was not stated there whether the rate was or was not calculated in accordance with the first schedule. It was held there that the rate of interest was incorrectly stated in the memorandum, and if one had regard to the transaction which was there stated, together with the provisions as to repayment, the rate of interest was not as stated, £325, but should have been in fact £330. But the question arising in that case, whether in reality the rate of interest should have been calculated on the basis of the first schedule to the Act, the question immediately arose on that whether it was open to treat the matter in such a way having regard to the fact that there was no mention in the memorandum of the interest having been treated as a notional rate under the schedule to the Act. Mr. Neville Laski in argument is reported at p. 688 as saying :

The rate of interest was correctly stated in the memorandum having regard to the terms of sect. 6 (2) . . . the rate of interest must, under sect. 6 (2) be calculated as provided in the first schedule to the Act, and when so calculated £240 per cent. per annum is found to be correct.

On that, the question immediately before the mind of the court must have been whether it was open in that case to treat the matter as being under the first schedule to the Act at all having regard to the form of the memorandum which appeared to treat the matter as a true rate of interest. It was for that reason no doubt that all their Lordships thought it right to express an opinion upon the assumption that the interest might be calculated on the rate contained in the schedule, and I, with every respect to MACNAGHTEN, J., in this case, cannot agree that the facts of that case did not raise in themselves the question whether if you had to have recourse to the first schedule in order to justify the rate of interest it would not be necessary so to state in the memorandum. However that may be, we have in express terms, as I read it, an opinion of LORD HANWORTH, M.R., on this point. He says this at p. 692, having discussed the questions of the interest

That being so, I turn back to the provision in sect. 6 (2) of the Act that the note or memorandum shall show "either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the first schedule to this Act." We are asked to amalgamate those alternative provisions and by some such method to arrive at the view that £240 per cent. per annum is really the rate of interest.

Now that reference of my Lord to the request to amalgamate the provisions shows clearly that reliance was being placed in part upon the alternative second limb of calculation of the rate of interest by reference to the schedule. Then he goes on :

That is in my view impossible. As I have pointed out already, the Act is intended to be exacting, and this compels us to read sect. 6 (2) precisely as it stands. When we do that it is clear that the memorandum with the promissory note attached does not contain what is required, with the result that the contract cannot be enforced.

So far, it may be, LORD HANWORTH, M.R., was speaking of the discrepancy in the rate of interest, but he goes on thus :

I would add that if the computation of the rate per cent. of interest be made under the first schedule [now that is the fact in the present case] then I think that the note or memorandum, after stating the amount of the instalments to be paid, should explain that they included interest at whatever rate of interest per annum was ascertained from the first schedule to the Act, and that this rate of interest has been found under that schedule.

Then I myself after saying that I agree that the appeal should be dismissed for the reasons stated by LORD HANWORTH, M.R., add this at p. 693 :

In other words, there may be either a true rate of interest or a notional rate per cent. per annum arrived at under the schedule. In these circumstances I do not think that the requirements of the section are fully complied with unless it is in the note or memorandum stated in terms whether the rate of interest therein mentioned is a true rate of interest or a rate per cent. per annum calculated in manner provided in the schedule.

I do not think that is meant to say that, if it appears to be a true rate of interest, on the memorandum it has got to be stated as such. If it is to be a rate of per cent. calculated in the manner provided in the schedule, I cannot read the language as saying anything but that that must be stated. Then I go on to say what has been said so often in these cases, that :

The object of the subsection is to provide for the borrower and the court a true note of the transaction, and to my mind it is not stating the true terms of the contract and so complying with the requirements of the subsection to speak of a rate of interest *simpliciter* when the rate stated is not part of the agreement between the parties but only a rate which has been ascertained by reference to the schedule.

Then ROMER, L.J., in the report which appears in 103 L.J.K.B. 612, goes on to say this :

I agree with both the judgments delivered and I desire expressly to associate myself with what SLESSER, L.J., has said.

That can only have reference to the particular observations I have just made with regard to the necessity for stating that the rate of interest is calculated in manner provided in the schedule. Those words do not appear in the copy in the LAW REPORTS, but it may be at one time the report suffered revision and that may explain that matter. But, as I understand, my Lord had no intention in leaving those words out to dissent at all either from what LORD HANWORTH, M.R., is reported as having said at p. 692 or what I said expressly at p. 693.

Now can it be said in this case—and this is the final matter—that the phrase “ the interest charged of £20 is equivalent to interest at the rate of £64 per cent. per annum ” satisfies the requirements of the Act. In my opinion, it is not possible so to do. It is true Mr. Levy is entitled to say that the use of the word “ equivalent ” does indicate that there is not there charged what I may call the true rate of interest, but that the £64 is ascertained by relation to the £50 and the interest charged, and is in that sense equivalent. But to say that it is equivalent is not to tell the borrower that it has been calculated in accordance with the formula required by the Act. It is not an easy calculation for a borrower or for a lender to make to find out what the rate of interest actually is. If the borrower be told it is calculated in accordance with the formula, then he knows that the formula has been duly applied. If he be merely told that it is equivalent to a certain rate of interest, in my opinion he is told not very much and at any rate he is not told what the statute requires he should be told and what this court has decided he should be told.

For those reasons, because in my opinion this case really is governed by the decision of *Parkfield Trust, Limited v. Curtis* (1), with every respect to the learned judge, I cannot agree with the view which he expresses in his judgment when he says :

I do not think that the judgments in the Court of Appeal in the case of *Parkfield Trust, Limited v. Curtis* (1) can be taken to mean what is alleged on behalf of the defendant. Every judgment must be read in view of the facts before the court.

As I have said, I think the facts before the court in the case of *Parkfield Trust, Limited v. Curtis* (1) did lead to the expression of opinion on the matters which have to be placed in the memorandum as a matter of necessity and arose naturally out of the argument, and in any event they are decisions unanimously given by this court on the matter here directly to be considered, and cannot I think be said to have been limited to any issues in the *Parkfield Trust, Limited* case (1).

Therefore, for those reasons, I think that the learned judge was wrong in not feeling himself bound by the *Parkfield Trust, Limited* case (1), and this appeal must succeed.

ROMER, L.J. : I too think that this case is concluded by the decision of this court in the case of *Parkfield Trust, Limited v. Curtis* (1). It is said by Mr. Levy that the observations of the members of the court in that case were mere *dicta*. I do not take that view at all. I think they were part of the actual decision of the court. The memorandum in that case was in these terms :

I, Curtis, am willing to borrow from you on May 25, 1933, the sum of £500 with interest at the rate of £240 per cent. per annum and upon the terms of a promissory note to be as hereunder.

The promissory note was in these terms :

I promise to pay to Parkfield Trust, Limited, or order the sum of £500 this day advanced to me together with interest at the rate of £240 per cent. per annum. Such sum of £500 to be paid together with interest then due by consecutive monthly instalments of £325 each commencing on June 25 next and the sum of £325 on July 25, 1933.

Now it would appear from that memorandum, *prima facie*, that the £240 per cent. per annum was a true rate of interest. If it were a true rate of interest, then when the first instalment of £325 was paid on June 25, 1933, only £100 interest was then due. Consequently the £325 would be allocated as to £100 to interest and as to £225 principal. The interest due on the principal of £225 up to July 25, 1933, when added to the £225, would come to more than £325 ; in point of fact it would come to £330. Consequently the defendant said, and said successfully, that the memorandum does not state the true contract between the parties. Obviously it did not, if £240 was a true rate of interest, because two instalments could not possibly be the repayment of £500 with interest then due. On that ground ROCHE, J., dismissed the moneylenders' action, and this court agreed he was right in doing so. But then it was said on the part of the plaintiff : " But if you really read this memorandum carefully you ought to arrive at the conclusion that the £240 per cent. per annum was not a true rate of interest but a rate of interest calculated in accordance with the schedule to the Act." The answer of this court to that was : " You cannot say that because there is no reference, as there should be, to the fact that the rate of interest had been calculated in accordance with the first schedule to the Act." LORD HANWORTH, M.R., said in terms, at p. 692 :

If the computation of the rate per cent. of interest be made under the first schedule, then I think that the note or memorandum, after stating the amount of the instalments to be paid, should explain that they included interest at whatever rate of

interest per annum was ascertained from the first schedule to the Act, and that this rate of interest has been found under that schedule.

That was the decision of this court, SLESSER, L.J., and I agreeing with it.

For those reasons, and also those given by SLESSER, L.J., I agree this appeal should be allowed.

FINLAY, J. : I agree with the Lords Justices in thinking that this appeal must succeed on the ground that this case is governed by the decision of this court in the case of *Parkfield Trust, Limited v. Curtis* (1).

Solicitors : *Philip Goodenday & Co.*, agents for *Alfred Bieber & Bieber*, Liverpool (for the appellants) ; *Lipton & Jefferies* (for the respondents).

[Reported by W. K. SCRIVENER, Barrister-at-Law.]

THE IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND), LIMITED v. PARSLAY.

[COURT OF APPEAL (Lord Wright, M.R., Slessor and Romer, L.JJ.).
May 27, 1936.]

Damages—Liquidated damages or penalty—Pre-estimate of damage—"Price-maintenance" agreement—Disparity between parties—Disparity between damages and price of article.

The defendant, who had been placed upon the "stop list" of the plaintiffs, entered into a "price-maintenance" agreement with them that he would not sell their goods at prices lower than those set out in printed schedules from time to time issued by them. The agreement contained a clause that for every breach thereof by the defendant he would pay to the plaintiffs the sum of £15 as liquidated damages in respect of each sale. The defendant committed breaches of the agreement and an action was brought for an injunction and to recover £165 as agreed and liquidated damages in respect of 11 such breaches. At the trial the learned judge held that the disparity between the price of the article sold and the sum to be paid as damages prevented such damages from being liquidated damages and were a penalty :—

HELD : the only question to be considered was whether the sum claimed as liquidated damages was a fair pre-estimate of the damage likely to flow from the breach, and not unconscionable. Neither the fact that the plaintiffs were a powerful and influential company and the trader a man in a very small way of business nor the fact that there was considerable disparity between the sum claimed as liquidated damages and the price of the article sold was relevant.

[EDITORIAL NOTE. The point is well settled that so long as the sum stated to be liquidated damages is a fair estimate of the probable damage and not unconscionable, such sum is not a penalty. In the present case it was argued that since the article was sold at about 1s., the sum of £15 as liquidated damages was unreasonable. The argument against this was that undercutting would have a most serious and widespread effect and in a practical sense was impossible to prove the damage resulting from a sale at less than the fixed price. In such circumstances the disparity between the selling price and the damages was held to be irrelevant.

AS TO LIQUIDATED DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 141-145, paras. 183-185; and FOR THE CASES, see DIGEST, Vol. 17, pp. 136-153, Nos. 422-546.]

Cases referred to :

- (1) *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*, [1915] A.C. 79; 17 Digest 138, 426.
- (2) *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Ramos)*, [1905] A.C. 6; 17 Digest 137, 424.
- (3) *English Hop Growers v. Dering*, [1928] 2 K.B. 174; 43 Digest 38, 377.
- (4) *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461; 43 Digest 19, 129.
- (5) *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.*, [1913] A.C. 781; 43 Digest 12, 68.
- (6) *Attwood v. Lamont*, [1920] 3 K.B. 571; 43 Digest 20, 131.

ACTION for (1) an injunction to restrain the defendant, his servant, or agent from selling any proprietary price-maintained tobacco or cigarettes manufactured by the plaintiffs at less than the proper retail prices from time to time set out in the plaintiffs' schedules of prices or price lists and from infringing the plaintiffs' conditions of sale; (2) the sum of £165 as agreed and liquidated damages for the breach of the conditions of sale.

Gavin Simonds, K.C., Walter T. Monckton, K.C., and B. L. A. O'Malley, for the appellant company.

B. M. Cloutman and A. Raven, for the respondent.

Simonds, K.C. : The learned judge was wrong in concentrating on the disparity of the sum claimed as liquidated damages and the price of the article sold; all the learned judge had to consider was whether the sum claimed was a fair pre-estimate of the damage which was likely to flow from the breach of the contract. Further, the learned judge was wrong in introducing an element of incongruity between the two parties—the fact that the respondent is a small man and that the appellant company is a powerful and influential company makes no difference because the law regards them as equals. The principles laid down in the *Dunlop* case (1) and in the case of *English Hop Growers v. Dering* (3) are the principles applicable to this case and should be followed.

Cloutman : The respondent was a small man who had been put on the "stop list" and the parties were not on equal terms. The sum claimed was an extravagant one and the learned judge was therefore right in holding that it was a penalty and not a liquidated sum.

LORD WRIGHT, M.R. : This is an appeal from a judgment of GODDARD, J., in an action which was brought by the plaintiffs, the well-known tobacco manufacturers, against the defendant who was a retail tobacconist who had a place of business at Watford Market. Before the contract which is in issue in this case was effected, he had been put on

what is called the stop list, that is to say he had been put on the list of tobaccoists issued by the Tobacco Trade Association, of which the plaintiffs were members, and the result of that was that he could not obtain from those members, including the plaintiffs, any of their proprietary price-maintained tobacco or cigarettes, but he desired to be removed from that inconvenient position and thereupon entered into the contract dated Sept. 26, 1934, on which this dispute turns. There is only one provision of the contract which is directly material, but I must refer to some of the terms. It is signed by the defendant and addressed to the plaintiffs and it begins by saying :

In view of my/our name having been taken off the stop list of the Tobacco Trade Association, and in consideration of your withdrawing your refusal to supply and agreeing to supply me/us with your proprietary price-maintained tobacco or cigarettes on cash terms, the quantities so to be supplied being entirely in your discretion I/we jointly and severally agree with you from this date,

and then follow a number of provisions of which only the first is material here :

I agree with you not to sell any proprietary price-maintained tobacco or cigarettes manufactured by you howsoever acquired at less than the proper retail prices as set out in your schedules of prices from time to time—

the plaintiffs do issue printed schedules of prices—

and particularly not to supply any person employed in an office or warehouse with proprietary price-maintained tobacco or cigarettes at less than such full retail prices.

Then in paras. 2, 3, 4, 5 and 7 there are other forms of breach of a similar character to which I need not refer, and then, finally, there is this clause on which the dispute turns :

Inasmuch as the damages caused to you by a breach of this agreement must inevitably have serious results but may in any given case not be readily capable of estimation I/we hereby agree to pay the sum of £15 as agreed and liquidated damages for every breach of clause 1 hereof.

—that is the clause that I have read, and then the agreement goes on to deal separately to a similar effect with those other breaches the details of which are not here material—£20 for every breach of clause 2, £15 for every breach of clause 3, £20 for every breach of clause 4 not covered by clauses 1, 2, 3 and 4, and £125 for every breach of clause 7. I need not deal with those separate matters.

That agreement having been completed in this way, it was ascertained at a later stage that the defendant was breaking it. The facts relied on are set out in the statement of claim and I need only say that there are set out there eleven specific cases in which the defendant is alleged to have sold cigarettes at less than the schedule price between Oct. 6, 1934, that is to say almost immediately after the agreement was entered into,

and Jan. 1, 1935, which was just before the writ was issued which was on Jan. 10, 1935. There are, therefore, here alleged a series of these breaches starting very soon after the date of the agreement and continuing right up to a date just before the issue of the writ. The difference in price between the schedule price and the price at which the defendant sold is, as one would expect, comparatively small. Twenty Player's Medium Navy Cut cigarettes were sold at 11d. whereas they ought to have been sold at 11½d., and similarly, Gold Flake cigarettes in cartons which ought to have been sold at 1s. were sold at 11d. That there are clear breaches of the agreement was not denied. At the trial the learned judge granted an injunction to the plaintiffs that is not objected to on behalf of the defendant, and that is not in question here, but he refused to enforce the damage clause which I have read as I gather he thought that it was merely a penalty clause and not a liquidated damages clause; and in fact the judgment drawn up, apart from the order for the injunction is simply this:

And the judge further declared that the sum of £15 provided for in the agreement between the plaintiffs and the defendant dated Sept. 26, 1934, was a penalty.

That is the point on which this court has now to adjudicate.

With great respect to the learned judge I find it impossible to agree with the view that he has taken. The clause here is *prima facie* a clause for liquidated and agreed damages. The mere use of a term which is well known is in no sense conclusive. The substance of the matter has to be looked at and rules have to be applied, so far as they are applicable to a particular case, that is to say the general rules for the construction of these clauses which have been laid down from time to time. Before I refer to the authorities, as I shall very shortly do, because I do not think with respect to the learned judge, there is any real doubt about the law or about the true principles that have been laid down clearly very many times recently, I should just refer to the circumstances of the plaintiff company. The plaintiff company is a very large concern and it, like other concerns of that nature, has adopted, as is well known, a system against price cutting or underselling. They are not peculiar in that. Most of the substantial tobacco manufacturers are parties to the organisation, the society to which I have already referred. Evidence was called on behalf of the plaintiffs before the judge. The evidence was very much curtailed because the learned judge expressed the view that what he had heard was sufficient, but it is, I think, quite as much as the circumstances required. What the witness who was called, the manager of the conditions of sale department of the plaintiff company, said was that the damages which the plaintiff company apprehended, if the uniform retail prices to the public were undercut, were of a very serious character, but that the damage flowing from any particular act of that

sort by any particular trader was very difficult, and indeed in a practical sense impossible to prove. I notice in one of the earlier cases *SANKEY, L.J.*, as he then was, gave as an illustration of the mischief that might follow under similar circumstances the case of throwing a stone into a pond. I need not be so picturesque, but it is quite obvious that where you have a price-maintaining system, which is an ordinary incident of this modern life in this type of business, any departure by a retailer from the terms which he has undertaken as to maintaining the schedule prices may have the most serious and widespread effect. What the particular witness referred to was this: he said in one case first of all many of their customers who purchase from them if allowed to undercut prices would not be able to pay their debts. Another circumstance was that if there was a cutter in a particular neighbourhood it would be impossible for the other tobacconists in that neighbourhood to keep up their prices and they would have either to follow his mischievous example so long as they were allowed, or go elsewhere and buy some other manufacturers' tobacco; that their sales would accordingly be affected and in addition if there was price cutting the members of the public would say when they compared the reduced prices with the price which they had been compelled to pay, either that they had been overcharged or that the quality of the tobacco was being reduced, or that would be the suspicion. The witness pointed out, which is a most vital point, that they had to do their trade as a whole, and tried to envisage what would happen if the conditions of sale were broken as a matter of practice. He also added that there was a great temptation to tobacconists to cut prices, especially if any particular one commenced.

There you have something which has been familiar enough to the courts for some time. The courts have had many opportunities of considering this type of point, and the leading case under this head is the *Dunlop Pneumatic Tyre Company v. New Garage & Motor Company Limited* (1), which was a case not altogether dissimilar to this. Dunlops, a concern very well known to everybody, require the various traders who purchase from them to enter into a somewhat similar agreement to maintain their schedule prices, and to pay a sum of £5 by way of liquidated damages for every tyre, cover or tube sold or offered in breach of the agreement. Of course, the subject matter there was the tyres and accessories which the Dunlop company manufactured and sold. It was pointed out by LORD ATKINSON in that case, in a passage which I will not read in full, what was the very great importance of maintaining a system of this sort, where you have manufacturers in the position of Dunlops, and how the whole distributing organisation of Dunlops would be dislocated, and how much their trade would be injured from the sale by one or more of their agents or factors of their goods at prices less than those named in the lists. He develops that topic at some length,

but really it must be obvious to anyone familiar with modern conditions of trade. That being so, it has been held by the learned judge that none the less in this particular case the penalty clause was not binding, and as I follow he has come to that conclusion for two reasons. One is that there was a disproportion between the penal sum of £15 and the price of any particular article, the sale of which would have constituted a breach to which the stipulated sum applied. That was one point, and the other point on which he relied was that as between a great manufacturing concern like the plaintiffs on the one hand, and a tobacconist selling in a market—whether from a stall or not I do not know, nor do I think it material—was such that certain consequences must follow. I will deal with that second point a little later, because it seems to me to be quite separate from the first point.

Now the first point I think is conclusively disposed of by the *Dunlop* case (1), and indeed by a number of other cases, most of which are referred to in the *Dunlop* case (1). Let me refer to LORD DUNEDIN's judgment, and I need not refer to it in detail because most of the points are not really open to dispute now. LORD DUNEDIN points out that the use of the term "penalty" or "unliquidated damages" is in no sense conclusive; that the essence of the penalty is the payment of the money stipulated as *in terrorem* of the offending party, and the essence of liquidated damages is a genuine covenanted pre-estimate of the damage, but that has to be explained by reference to a later passage in the judgment which really is of vital importance, namely, this: LORD DUNEDIN points out, at pp. 87 and 88:

It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

That, I think, is a point which is perhaps put even more clearly by the EARL OF HALSBURY, L.C. in the case of the *Clydebank Engineering & Shipbuilding Company v. Don Jose Ramos Yzquierdo y Castaneda* (2), where the Lord Chancellor, at p. 11 points out the true position in these words:

The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive.

In this particular case the agreement itself points to that position, inasmuch as it recites that the damages caused by a breach of this agreement must inevitably have serious results which may in any case not be readily capable of estimation. There is that principle which is well illustrated in the two cases to which I have referred.

Then there is a further matter which has been discussed in argument

and which is discussed by the learned judge, and a matter which I think he has in mind when he refers to the disproportion between the price of the article sold and the liquidated damages, but with great respect, that is a misleading way of looking at the position. If questions of disproportion have to be considered, the relevant disproportion must be not between the price of the article but between the stipulated sum and the possible or probable amount of the damage. The disproportion to be material at all must be between the actual damage and the estimated figure of damage, and where, as here, it is impossible to specify in advance or prove the actual damage, and that is the common case in contracts of this nature, as in *Dunlop's* case (1) and in many others, the only question can be whether the stipulated sum is so extravagant or exorbitant that it cannot be regarded as having any real relation to any loss which the plaintiffs can possibly sustain. That is what is meant by the expressions which are used from time to time. For instance, we have in LORD ATKINSON'S judgment, a reference to a figure which is extravagant, and if that is extravagant then that may be a ground for saying that it is not a genuine case of liquidated damages. The word "unconscionable" is also used. It is used by LORD ATKINSON on p. 95, and it is used by LORD DUNEDIN on p. 87, and it is used in other passages, but I do not think the word "unconscionable" there has any reference to the fact that the parties were on an unequal footing. It does not bring in at all the idea of an unconscionable bargain. It is merely a synonym for something which is extravagant and exorbitant, and a very cogent instance of a case of that nature is given by the EARL OF HALSBURY, L.C. He says at p. 10 :

I suppose it would be possible in the most ordinary case, where people know what is the thing to be done and what is agreed to be paid, to say whether the amount was unconscionable or not. For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for £50, you were to pay a million of money as a penalty, the extravagance of that would be at once apparent. Between such an extreme case as I have supposed and other cases, a great deal must depend upon the nature of the transaction—the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth.

Then he goes on to point out how that has to be applied where the damages are quite uncertain. I see nothing at all in this case to justify the court in saying that this sum of £15 is unconscionable or extravagant when as applied to each particular instance in which the breach has been committed, and again, with respect to the learned judge, I think the disproportion which he has referred to between the price of the article and the sum of £15 is entirely fallacious as a guide.

I am not going to refer to the many other cases which have been cited, for instance *English Hop Growers, Ltd. v. Dering* (3), which I should not think it necessary to cite on the point which I have been

discussing. It merely gives effect to what has already been said in the earlier cases, but I am not sure that in some degree it has not misled the learned judge in regard to the second position which he took up, namely, that the two parties, the company and the defendant, were so unequal in situation that a contract of this nature could not be enforced by the plaintiffs against the defendant.

I cannot see any authority to justify the introduction of any such element into a case of this nature. You have here no doubt a very large concern. On the other hand you have a tobacconist who is of full age and of competent understanding—nothing is said to the contrary—and he has entered into an agreement which is perfectly clear in its terms and which he must be presumed to have fully understood. I think the learned judge may have failed to appreciate that in *English Hop Growers, Ltd. v. Dering* (3) there are two quite separate issues being considered, and there is a third which is not here material which I need not mention; but there was the question as to whether the contract there, which was a contract in restraint of trade, was enforceable within the rules which apply to contracts in restraint of trade. It was a contract the purposes of which was a combination of hop growers. It was a typical contract in restraint of trade, and language is used there which pointed out that in a question of that sort it may be important to consider what was the actual position of the parties one against the other, and it was in that connection that SCRUTTON, L.J., who held like the rest of the Court of Appeal that this contract though in restraint of trade was perfectly valid, quoted the language of VISCOUNT HALDANE, L.C., in the *North Western Salt Company v. Electrolytic Alkali Company* (4), at p. 471 to this effect:

When the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves.

The question which SCRUTTON, L.J., was considering was something entirely different from the question here. The question was whether the agreement was invalid as being against public policy, that is the agreement as a whole, but no one is attacking or has attacked the validity of the agreement here as a whole, and the point here is simply whether this is a penalty or liquidated damages, and that is the third point which SCRUTTON, L.J., and the other members of the court, SANKEY, L.J., ROMER, J., as he then was, dealt with and dealt with exactly on the lines which I have already elucidated from the two cases. I notice SCRUTTON, L.J., at p. 182, says on that point:

I cannot see anything unreasonable in fixing the damages against a man, who having become a member, risked breaking up the whole system of the company by refusing to join in the pool, and entering into individual competition, at £100 an acre brought into the scheme.

The liquidated damages there amounted to £6,300 in respect of 63 acres, and the amount is very substantial, and there was no suggestion that it was extravagant. Nor can there be any suggestion here, I think, that it was extravagant; nor can I see any reason for introducing into a question of this sort any consideration of the relative wealth or poverty of the two parties. A millionaire may enter into a contract in which he is to pay liquidated damages, or a poor man may enter into a similar contract with a millionaire, but in each case the question is exactly the same, namely, whether the sum stipulated as damages for the breach was exorbitant or extravagant in the sense that I have indicated.

I think here the appeal should be allowed, and instead of the declaration which the learned judge made it should be :

The judge declared the sum of £15 provided for in the agreement between the plaintiffs and the defendant dated Sept. 26, 1934, is not for a penalty but a sum of liquidated damages.

I may say with reference to an argument addressed by Mr. Cloutman that this is pre-eminently a case in which the court exercising its discretion can properly make a declaration.

The respondent will pay the costs.

SLESSER, L.J. : I agree. The last paragraph of the contract between the parties in question in this case is in the following terms :

Inasmuch as the damages caused to you by a breach of this agreement must inevitably have serious results but may in any given case not be readily capable of estimation I/we hereby agree to pay

and then follow the sums which are consequent upon the breaches of the various clauses in the agreement. In my opinion there is no reason on the facts of this case or the construction of this contract to come to any conclusion but that those words do truly express the intention of the parties that the damages not being readily capable of estimation are pre-estimated by the various figures set out in that paragraph. Indeed, when the matter is rightly considered, it seems to me that there is only one possible question which can arise in this case, and that is whether the estimate of damage which is set out in that paragraph, £15 in the case of clause 1, is so extravagant an estimate of the damage which is ever likely to occur as to point to the whole matter being one of penalty rather than of liquidated damages.

That, as I understand the decisions, more particularly the *Dunlop* case (1), is the matter on the facts of this case to be considered, and the learned judge has come to the conclusion that this estimate is an ex-

travagant one, but as my Lord has pointed out, he has come to that conclusion upon a criterion which cannot be supported in law. He says :

I can find no case where the disproportion between the value of the article and the stipulated sum is so great as in this case.

Of course, that is not the question to which he ought to have addressed his mind. The question which he has to consider is not the value of the article, but whether the damage as estimated is extravagant in relation to the damage which might possibly follow.

It is a case singularly in principle like that of the *Dunlop* case (1), where similarly a manufacturer was concerned to maintain a minimum price or fixed price for his articles which price would be jeopardised by sales taking place below an amount stated in a schedule, and that matter is pointed out at p. 88 by LORD DUNEDIN to be one essential where the damage as a whole from such a practice, which is a practice very much like the present one here

would be certain, yet damage from any one sale would be impossible to forecast. It is just, therefore, one of those cases where it seems quite reasonable for parties to contract that they should estimate that damage at a certain figure, and provided that figure is not extravagant there would seem no reason to suspect that it is not truly a bargain to assess damages.

In my view, if we have to consider the matter, and I think we must as the learned judge has not in my view applied the proper test, this sum set out here of £15 for the breach of the contract is a reasonable pre-estimate of damage; it is not extravagant, at least not so extravagant as to lead me to the conclusion that this was imposed *in terrorem* as a penalty.

The only other matter which I would care to mention is this, that the learned judge has continued in his judgment to say that in arriving at the conclusion, that is the conclusion that this is a penalty :

I have also taken into account what I consider to be the unequal position of the contracting parties.

Now such a view, if it were to prevail, would produce consequences so revolutionary that I think it right to pass a few words upon that point. The case to which he refers, *North Western Salt Company, Limited, v. Electrolytic Alkali Company, Limited* (4), is a case of an allegation that a contract was not maintainable because it was illegal as being in restraint of trade. The question arose whether the contract was or was not so reasonable for the protection of the parties upon the ordinary principle that it could be said to be bad as being in restraint of trade, and VISCOUNT HALDANE, L.C., is speaking of a contract in restraint of trade and it is in relation to that matter that he contrasts a commercial agreement with a contract of service. Even then I do not read the words

of VISCOUNT HALDANE, L.C., as distinguishing in a commercial agreement, apart from a contract of service, between the financial situation of the two parties, or their richness either in money or in goods. The only distinction that is drawn is one between a commercial contract on the one hand and a contract of service on the other. And the same observations may be made of what is said by LORD PARKER in *Attorney-General of Australia v. Adelaide Steamship Company* (5), and in *Attwood v. Lamont* (6). All these, which draw attention to the distinction between contracts of service and commercial agreements are dealing with cases in restraint of trade. They have in my opinion no relation whatever to the problem which we have here to consider as to the difference between a penalty and an estimate of liquidated damage, and I think the position of the contracting parties, be it equal or unequal, has nothing to do with the case. As my Lord has pointed out, the contract as a whole is not impeached. There are methods by which contracts as a whole may be impeached for fraud or duress or whatever the cause may be. The only question here is whether the parties did or did not intend to estimate their damage. On that their relative economic or social position cannot in my opinion have any bearing whatever.

I agree with what my Lord has said, and only add these words because I have the misfortune to differ from the learned judge on both reasons which he has given for his judgment.

ROMER, L.J.: I agree. The reason which induced the House of Lords in the *Dunlop* case (1) to come to the conclusion that the sum there mentioned really represented liquidated damages and was not in the nature of penalty, equally impels us, in my opinion, to come to the conclusion that the sum mentioned in this case is not a penalty, but truly represents liquidated damages. The learned judge, indeed, could have arrived at that conclusion himself, had he not thought that there were two circumstances in the present case which serve to distinguish this case from the *Dunlop* case (1). The two circumstances were these: first he found a large disproportion between the sum referred to in the agreement as liquidated damages, and the price of the goods sold in breach of the contract. In my opinion that disproportion is a wholly irrelevant consideration. Nobody can say what the damage sustained by the plaintiffs' trade will be from the breach of one of these contracts, and damages may be just as large where the contract is broken by the sale of a cheap article as where the contract is broken by the sale of a more expensive article. It is indeed the disproportion between the damage sustained by the plaintiffs by reason of the breach and the value of the article sold that constitutes the breach that makes it impossible to calculate the damage sustained by the plaintiffs, and renders it reason-

able that the parties should form some pre-estimate of the damage to cover all cases.

The second consideration that the learned judge thought distinguished this case from the *Dunlop* case (1) was that to which my Lords have already referred. He thought that the parties were not contracting on equal terms, and that that is a consideration that might lead him to the conclusion that the sum was a penalty and not liquidated damages. But the only question that has to be determined in the present case is whether the sum that the parties have mentioned in the agreement is obviously larger than any damage that could possibly be sustained by the plaintiffs by reason of any particular breach of the contract. If it is larger than any such damage then we must hold that the sum is a penalty and not liquidated damages; if it is not larger, then applying the reasoning in the *Dunlop* case (1) it seems to me that we are driven to the conclusion that these sums constitute liquidated damages and not a penalty. The fact that the parties, if it be a fact, were not contracting on equal terms appears to me, with great respect to the learned judge, to be a wholly irrelevant consideration in deciding that question of fact.

For these reasons, in addition to those which have been given by the other members of the court, I think this appeal must succeed.

Solicitors: *Russell & Arnholz*, agents for *T. Murray Sowerby*, Bristol (for the appellants); *Turner & Co.*, agents for *S. J. Weaver*, Watford (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

REED v. CATTERMOLLE (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), May 25, 26, 1936.]

Income Tax—Income under sched. E—Rent-free occupation of house—Minister of religion.

The appellant, a minister of the Methodist Church, was required by the constitution of that church to reside in the house provided for him by the circuit. The house was acquired by the circuit who paid the minister his stipend, furnished the house, decorated it, repaired it, and in fact paid (or repaid to the minister) the sched. A tax assessed upon it. The minister was strictly required to live in the house provided by the circuit, whether suited to his needs or not. The appointment and dismissal of the minister was not a matter for the circuit, but for the annual conference, by whom he could be removed without notice. The question was whether the appellant was taxable under sched. E in respect of his occupation of such a house, treating it as a part of his remuneration:—

HELD: there was no evidence upon which the commissioners could find that the appellant had the beneficial occupation of the house and it could not be treated as part of his remuneration.

[EDITORIAL NOTE. The previous cases upon ministers' houses were much considered in the House of Lords in *Inland Revenue Commissioners v. Miller* (8),

and there the House definitely rejected the criterion of a right in the occupier of the premises to let them or otherwise turn the annual value thereof into money. The question in such cases is therefore whether the occupier has the beneficial occupation of the property or is merely required to occupy them as part of his agreement with the actual owners thereof. This is the first occasion, since the decision in the House of Lords above referred to, upon which this question has arisen in respect of a minister's house. That case itself however was concerned with a widow's occupation of property under the trusts of a will.

FOR RENT-FREE OCCUPATION IN RELATION TO INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 265, para. 533; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to :

- (1) *Hartland v. Diggines*, [1926] A.C. 289; 28 Digest 88, 506.
- (2) *Dobson v. Jones* (1844), 5 Man. & G. 112; 30 Digest 521, 1758.
- (3) *Hughes v. Chatham Overseers, Burton's Case* (1843), 5 Man. & G. 54, 77; 30 Digest 521, 1757.
- (4) *Bent v. Roberts* (1877), 3 Ex. D. 66; 1 Tax Cas. 199; 28 Digest 14, 71.
- (5) *Smith v. Seghill Overseers* (1875), L.R. 10 Q.B. 422; 30 Digest 521, 1761.
- (6) *Tennant v. Smith*, [1892] A.C. 150; 3 Tax Cas. 158; 28 Digest 17, 87.
- (7) *Russell v. Town & County Bank* (1888), 13 App. Cas. 418; 2 Tax Cas. 321; 28 Digest 45, 227.
- (8) *Inland Revenue Comrs. v. Miller*, [1930] A.C. 222; 15 Tax Cas. 25; Digest Supp.
- (9) *Tollemache v. Inland Revenue Comrs.* (1926), 96 L.J.K.B. 766; 11 Tax Cas. 277; Digest Supp.
- (10) *Sutton v. Inland Revenue Comrs.* (1929), 45 T.L.R. 565; 14 Tax Cas. 662; Digest Supp.
- (11) *Nicoll v. Austin* (1935), 19 Tax Cas. 531.
- (12) *Inland Revenue (M'Dougall) v. Sutherland* (1894), 21 R. (Ct. of Sess.) 753; 3 Tax Cas. 261; 28 Digest 86, Case (m).
- (13) *Inland Revenue (Corke) v. Fry* (1895), 22 R. (Ct. of Sess.) 422; 3 Tax Cas. 335; 28 Digest 87, Case (n).
- (14) *Inland Revenue Comrs. v. Wemyss* (1924), 8 Tax Cas. 551; 28 Digest 106, Case (p).

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts appear from the judgment.

Cyril L. King for the appellant.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: This is a difficult case, because it requires consideration of and distinction between two cases in the House of Lords and a number of other cases. The question is whether the appellant is liable to be assessed under sched. E in respect of the tax under sched. A upon the house in which he resides as a manse for the purposes of his ministry, and in respect of the rates and water rate in respect of that house. The appellant is a minister of the Methodist Church. The facts

are somewhat obscure as to what actually happened with reference to the assessment to tax under sched. A, but the facts generally as to his residence in his house are stated in the case. It appears from them that his appointment involved that he should go and reside at this house, which was provided for the minister of what is called the Redhill Circuit, and he had to go there although it was in fact too large for his needs. The Methodist Church is governed by the Annual Methodist Conference, and under the Annual Methodist Conference there are district circuits. There are circuit stewards appointed by these circuits to carry out the administrative work of the church, and those circuit stewards are responsible for the financial needs of the circuit. The circuit acts through its quarterly meeting and provides the minister's stipend and, according to the case, buys or otherwise acquires a manse in which the minister of the circuit is required to reside and from which he carries on his work, such as preaching, and work of administration. He is not allowed to sub-let it or make any profit out of it. It is furnished by the circuit, decorated by them, repaired by them, and in fact the sched. A tax is paid by them or else repaid to the minister.

The case states that it is a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit, whether it is suitable for him or not, in order that he may perform his duties. The circuit have no power of appointment of the minister, his appointment and his dismissal or removal being in the hands of the conference, and he can be removed by the conference without any notice of any sort. As regards the actual assessment to sched. A, it appears that the appellant was entered in the sched. A assessment book as occupier, and the Wesleyan Methodist Church as owner, of this house. But he was unaware of the terms of the assessment book. The receipt for the payment of the tax states the name of the person assessed, or occupier under sched. A, as the Redhill Methodist Circuit, and the receipt was for the sum of £6 7s. 6d. from Mr. G. Pelham. In the contention of the appellant, it is said that the appellant at no time had notice that he was assessed to tax under sched. A. In these circumstances, the point was raised at first that these facts amounted to an assessment to sched. A tax upon the appellant, and that he having been assessed to tax and not having appealed, that created a legal liability upon him in respect of that tax, and that as the circuit had actually paid the amount of the tax to him, or rather, to the income tax authorities, and in that way had relieved him in respect of his tax as minister of the amount of that legal liability, the matter fell within the principle of the case of *Hartland v. Diggines* (1). At a later stage, in view of the way in which the facts had been proved before the commissioners, that point was waived by the counsel for the Crown, and I therefore express no opinion upon it.

The other two points which have been argued before me are, first

of all, that the question whether the appellant is taxable under sched. E in respect of his occupation of the manse was a question of fact upon which I am bound by the commissioners' decision, and secondly, that apart from the finding of the commissioners, he was in beneficial occupation of the manse and that that is therefore an emolument within the meaning of sched. E. I am not prepared to take what would be the simple course of deciding that this case is a question of fact upon which I am bound by the decision of the commissioners. The matter was stated, it seems to me, by way of a contention of law, a point being raised that the residence of the appellant in this house did not constitute beneficial occupation, but, so far as it was occupation at all, was representative of the circuit or the conference or the church. Apart from its being raised as a matter of law in that way, I am of opinion that upon these facts as stated by the commissioners there was no evidence upon which they could decide that the appellant had a beneficial occupation in the manse. The Attorney-General's argument, which was continued by Mr. Hills, was first of all that it was a question of fact. Then, apart from my being bound by the decision of the commissioners and from its being a question of fact, he drew my attention to the cases which he said were on either side of the line. He said everyone would agree that if an employee was asked by his employer to find a house in a particular locality and then the employer bought or leased a house for him, the occupation of that house would be considered to be the occupation of the employee, but that taking the other side of the line, in the case of a policeman who occupies part of the police premises, it would not be beneficial occupation. He said the fact that the employee was required to reside in the particular house made no difference, that the essential test for the purpose of deciding whether the occupation was a beneficial occupation of the employee or remained the occupation of the employer, was that the premises in question must be part of the premises of the employer. My attention was called by the appellant's counsel to a number of cases, some of which are rating cases and one of which is an income tax case, where occupation for the purposes of rating, and in one case for the purposes of income tax, is distinguished according to whether it is what may be called representative occupation or beneficial occupation; or in other words, whether the person who resides in the house is to be considered as residing there as a tenant or as a servant. One of the best passages in which that is laid down is in the case of *Dobson v. Jones* (2). At p. 120, TINDAL, C.J., delivered the judgment of the court. The case was dealing with the rateability of a naval surgeon at Greenwich Hospital. TINDAL, C.J., referring to the previous case of *Hughes v. Overseers of the Parish of Chatham* (3), said :

Upon that occasion, we declared our opinion to be that those officers or servants who fell within the first description might properly be considered to occupy as

tenants, although the residence was allotted to them as such officers and servants; and although they might, if such residence had not been allowed to them, have had an additional allowance for lodging-money; whilst at the same time we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made—with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant: upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters.

Then he goes on to decide that the occupation of the naval surgeon was as servant and not as tenant, and the headnote is:

inasmuch as he was *required* to occupy the same with a view to the more efficient performance of his duties as surgeon.

Another case on this line to which my attention was drawn was *Bent v. Roberts* (4). That was a case of income tax. It was the case of a policeman. The headnote is:

A police constable, compelled by the police authorities to live in a house having a communication with a police station by a doorway between the two yards, the residence there of the constable being necessary for police purposes, and the constable being liable to removal to another station at any time, not an occupier within the meaning of the Acts.

Before stating the contention of the Attorney-General, I ought to refer to the case of *Smith v. Seghill* (5), which was the case of a collier who was held to occupy as a tenant on the very ground that he was not compelled to live in a house which was provided, although he could if there was one available. That group of cases was relied upon by the appellant as showing that where the residence of the person sought to be rated or taxed is in the house in question, for the interest of the employer and for the more effectual performance of the service required from such officer, and that person residing is required to live in that particular house, there the occupation is the occupation of the master and not the servant. The Attorney-General distinguished all these cases by saying that they were cases where the house occupied was part of the premises of the employer, and also in the case of the policeman that the policeman sometimes used the house actually for the purposes of his duty, such as bringing prisoners there, and in the case of the naval surgeon it was an essential part of his duties that he should be in Greenwich Hospital, and that when he was not there, somebody else should be there in his place. Similarly, in the case of *Tennant v. Smith* (6), where the bank agent of a Scottish bank lived on the premises of a bank, he was required to live there and his presence there was necessary for the purposes of his duty. The Attorney-General insisted

that in all those cases the essential fact was not that the man should be required to live there, but that the premises where he was required to live should be part of the employer's other premises which were used for the purposes of the office of the resident. In *Tennant v. Smith* (6), LORD HALSBURY put the case largely upon the fact that the bank agent could not turn the premises to any profit ; but LORD WATSON, at p. 166, put the case on the other ground. He said, at the bottom of that page :

The appellant is not a proprietor, neither is he an occupier within the meaning of sched. B. The bank are the only occupiers, being as LORD HERSCHELL said in *Russell v. Town and County Bank* (7): in the same position as if that portion of their bank premises were used in any other way in the strictest sense for the purposes of the bank, and the business of the bank. The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwelling-house or business premises, instead of occupying a separate residence of his own.

LORD MACNAGHTEN, on p. 169, says :

From the case stated for the opinion of the Court of Exchequer in Scotland, it appears that "the appellant is bound as part of his duty to occupy the bank house as custodian of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours." He is not entitled to sub-let the bank house or to use it for other than bank business, and in the event of his ceasing to hold his office he is under obligation to quit the premises forthwith. Property therefore in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear therefore that the appellant is not chargeable under sched. A in respect of the bank house or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay.

LORD HANNEN uses expressions of a similar sort on pp. 171 and 172, and refers to the apt illustration of LORD YOUNG,

of the master of a ship who is spared the cost of house rent while afloat.

LORD YOUNG had pointed out that, although he was spared the cost of a house, that did not render him the beneficial occupier of the cabin. The Attorney-General, as I have said, insists upon the fact that in all those cases the premises occupied were part of the premises of the employer. But in my judgment that was not the true *ratio decidendi*. I think that all the cases were really decided upon the view expressed by TINDAL, C.J., in the case of *Dobson v. Jones* (2), that the residence was for the interest of the employer and for the more effectual performance of the service required from the officer, and if the circumstances of the particular office did not require that the officer should live in

premises which are part of the premises which are used for his office, for instance, to take the case of a minister, which do not immediately adjoin a church, it may still be for the interest of the employer and not for the remuneration of the employee, and for the more effectual performance of his service, that he should live in a house which is not so contiguous to the particular church. Of course, in the circumstances of this particular office it is clear why that is so : because the minister in question, the appellant, has to minister at a number of churches, and his house is placed in some convenient position with reference to all the churches at which he has to minister. I am therefore of opinion that the test suggested by the Attorney-General is not the true test. He also contended that the case of *Lady Miller* (8) and other cases of that sort, namely, the *Tollemache* case (9) and the *Sutton* case (10), and the case of *Nicoll v. Austin* (11), govern the present case and ought to be followed in preference to *Tennant v. Smith* (6). That contention is based, I think, principally upon the observations in *Lady Miller's* case (8) as to the erroneous nature of the decision or the reasoning in the cases of *M'Dougall v. Sutherland* (12), and *Corke v. Fry* (13). In *M'Dougall v. Sutherland* (12), the Court of Session had decided that a free church minister was not taxable in respect of his manse, and the *ratio decidendi* of that case was, in my opinion, that he was not taxable because he could not let and therefore could not turn the manse to profit. That *ratio decidendi* was expressly dissented from by all the learned Lords who decided *Lady Miller's* case (8). In the case of *Corke v. Fry* (13), the minister was a minister of the established church, and the church there was not vested in any trustees. In the case of *M'Dougall v. Sutherland* (12) it was vested in trustees. In the case of *Corke v. Fry* (13), at any rate, it was not vested in trustees, and the court held that the minister was assessable under sched. A in respect of the manse, but they put their decision upon the fact that he could turn the manse into money by letting it. Mr. King, for the appellant, contended that in *M'Dougall v. Sutherland* (12) there was no express requirement that the free church minister should live at the manse, and it does not appear that there was, but LORD ADAM, in dealing with the case, treats it as though there was. I do not distinguish it on that ground. Coming now to the case of *Lady Miller* (8), that was quite a different case from these cases which deal with ministers of religion. It was the case of a widow of a gentleman who had left property to trustees upon the trust that his widow might occupy one of his houses rent free and tax free. It was contended there on behalf of the widow that because she could not let the house under the terms of the will, therefore she had no beneficial occupation. The House of Lords in that case held that that was not the true view, and for that reason, in my opinion, they expressed their disapproval of *M'Dougall v. Sutherland* (12) and the reasoning in

Corke v. Fry (13). At p. 77, LORD BUCKMASTER put on one side, in my view, such cases as I have here to consider, when he said this: "Her occupation"—that is Lady Miller's occupation—"was in her own right, and she was not occupying as the representative of the trustees." Then he deals with *Tennant v. Smith* (6) and he quotes with approval the passages which I have already read of LORD WATSON and LORD MACNAGHTEN, and says, at p. 80:

It is unnecessary to investigate this decision further, but it is well to add that, in referring to phrases used by the other members of your Lordships' House who heard the case, such as those relating to the inability of the agent to make a profit out of his occupancy, these phrases must all be read in relation to the central facts and features of the case to which I have referred. To my mind, therefore, this case in no way governs the present.

So that having clearly distinguished *Lady Miller's* case (8) from *Tennant v. Smith* (6) already by saying that her occupation was in her own right under the will and not as representative of the trustees, and then having gone on to refer to the passages in LORD WATSON'S and LORD MACNAGHTEN'S judgments where they point out that the occupation of the bank agent in that case was representative and was not his own right, he then goes on to dispose of the other *ratio* in *Tennant v. Smith* (6), namely, that the bank agent could not make any profit out of the premises by letting them. He says, at p. 81, that:

Fry v. Inland Revenue [that is *Corke v. Fry* (13)] was right in the result but wrong so far as it made the power to let the rigid exclusive test of liability. The case of *Inland Revenue v. Sutherland* (12) was wrongly decided.

In my view, what he meant to say was that the case of *Inland Revenue v. Sutherland* (12) was wrongly decided upon the ground upon which it was decided. VISCOUNT DUNEDIN said, at p. 83:

I have already said that I think the free church manse case ill decided. I think the same of the *Wemyss* case (14).

The *Wemyss* case (14) was a very similar case to the *Lady Miller* case (8), decided by the court of session in the opposite way to the way in which the House of Lords decided it.

The bank case which was in this House and therefore is binding on me has, I think, been only misunderstood. The whole point was that it was found as a fact that the occupation of the bank by the agent was not truly his occupation but the bank's occupation, and the tax due under sched. A was no more leviable on the agent than it would have been on a caretaker who lived on the premises to keep them clean.

LORD WARRINGTON, at p. 85, said:

The question there [that is in the case of *Tennant v. Smith* (6)] was whether the income from all sources of a servant of a bank includes as part of

his emoluments under sched. E the annual value of a portion of the bank premises in which as a servant of the bank he was required to reside. The bank itself was assessed in respect of the whole of the premises under sched. A and paid the tax. It was held that nothing in respect of the annual value of the portion occupied by him of the bank premises could be treated as income under sched. E. This case had nothing to do with sched. A, and in addressing this House LORD MACNAGHTEN recognised that income from all sources includes the annual value under sched. A. and the annual value chargeable under sched. B. This case is no authority in support of the respondents' case.

Of course, in the present case I am impliedly holding and am of opinion that the appellant was not properly assessed if he was assessed under sched. A. *Miller's* case (8) appears to me to be entirely different from the case of *Tennant v. Smith* (6) and from the present case, and so do the other cases to which Mr. Hills referred me : *Tollemache's* case (9), where trustees under a will were by the will to keep the mansion for the successor of the testator and they were to keep it allowing the then Lord Tollemache to occupy under the will. It is clear, in my view, that in that case Lord Tollemache was beneficially entitled, the bare legal estate being in the trustees, and ROWLATT, J., in that case, at p. 286, expressly distinguishes that case from the class of cases with which I consider I am dealing. He said :

In three Scottish cases, *Tennant v. Smith* (6), the free church minister's case and the established church minister's case, the question was whether the subject's occupation was not merely the occupation of which a familiar example is the servant's occupation ; that is to say, there was no occupation at all ; that it was the employer's house, and that the servant lived in it, but the house remained in the occupation of, and every conceivable interest in the house remained in, the master, and that the servant merely had it put at his disposal, as a gardener or a chauffeur may be given quarters by his employer. In those circumstances, although it is very nice to have, in addition to your salary, a place of residence provided for you, which saves your pocket, as LORD MACNAGHTEN pointed out, what the income tax hits is not what is saved your pocket, but what goes into your pocket.

That was a distinction between the class of cases with which I have to deal here and the class of cases which were being dealt with in *Miller's* case (8) and *Tollemache's* case (9) and *Sutton's* case (10). The other case of *Nicoll v. Austin* (11) was not a case where it was under a will or a trust ; it was a case where a company paid its managing director for the upkeep of his own house because they wanted him to continue in it, presumably for the purposes of the general reputation of the company. There it was his own house, he was proprietor of the house, he always lived in it, and that, in my view, is clearly distinguishable from the present case. In view of the actual facts, therefore, found in this case, and applying the principle which I understand the cases to have laid down, having regard to the fact that the appellant was required to reside in this particular house to carry on his work therefrom,

that the house was furnished by the circuit and decorated by the circuit, that it was a strict requirement that the minister should live in the house in order that he might perform his duty, and the fact that he might be turned out of the house without a moment's notice by the conference, it appears to me that there was no evidence upon which the commissioners could properly find that the appellant had the beneficial occupation of this house. I am therefore of opinion that this appeal ought to be allowed with costs.

Solicitors: *Butt & Bowyer*, for the appellant; *Solicitor of Inland Revenue*, for the respondent.

[Reported by *LESLIE CARNEGIE, Esq., Barrister-at-Law.*]

DRYDEN v. SURREY COUNTY COUNCIL AND STEWART,

[KING'S BENCH DIVISION (Finlay, J.), **May 29, 1936.**]

Evidence—Two defendants—Distinct cases—Cross-examination

Medicine—Negligence of nurses—Professional duty—Liability of hospital.

The defendant S. performed a minor operation on the plaintiff in the defendant council's hospital. After she had left the hospital the plaintiff complained of pains, and upon examination by her doctor she was found to be suffering from pyelitis, and a wad of surgical gauze was found in and removed from her body. The plaintiff brought an action against S. for breach of duty and neglect to remove the plugging after the operation, and against the defendant council for breach of duty and negligence arising out of a failure to nurse her properly. The negligence alleged against the council was that the nurses in their hospital had failed to remove the plugging, had failed to observe or report to the doctor in charge certain symptoms in the plaintiff's condition, and had failed to take her temperature on the morning on which she had left the hospital. At the hearing counsel for S. put leading questions to witnesses for the defendant council:—

HELD: (i) upon the evidence S. had negligently left the gauze in the plaintiff's body and was liable in damages.

(ii) the negligence alleged against the nurses was negligence in carrying out their skilled duties as nurses, for which the defendant council were not liable.

(iii) upon the evidence the nurses had no reason to know that the gauze had been left in, and inasmuch as the plaintiff had not complained of pain there was no duty upon the nurses to discover the presence of the gauze.

(iv) inasmuch as the temperature had pursued a perfectly normal course and gave no indication that there was anything wrong, the nurses were not negligent in not taking the plaintiff's temperature on the morning on which she left the hospital.

(v) the causes of action against the two defendants were quite distinct and arose to a substantial extent out of different facts, and counsel for the one defendant was entitled to cross-examine a witness for the other.

(vi) there ought not to be an order that the plaintiff should recover the costs payable by her to the defendant S., as the acts of negligence alleged against the two defendants were different.

[EDITORIAL NOTE.] In this case the acts of negligence alleged against the nurses were clearly professional acts, but the judgment deals very fully with the question as to how far such acts were necessary. The particular acts dealt with are examination of the patient after an operation and the taking of her temperature before discharge from hospital. There is also an evidence point in the case as to the cross-examination of a co-defendant's witnesses.

AS TO THE LAW ON THE LIABILITY OF HOSPITALS, see HALSBURY, 1st Edn., Vol. 20, Medicine, p. 334, para. 818, and FOR THE CASES, see DIGEST, Vol. 34, p. 550, Nos. 86, 87, and Supp. AS TO CROSS-EXAMINATION OF CO-DEFENDANT'S WITNESSES, see HALSBURY, Hailsham Edn., Vol. 13, p. 757, para. 831, and FOR CASES, see DIGEST, Vol. 22, p. 459, Nos. 4807, 4808. AS TO THE BULLOCK ORDER, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 1403, 1404, and FOR CASES, see DIGEST, Practice, pp. 877-880, Nos. 4176-4197.]

Cases referred to :—

- (1) *Evans v. Liverpool Corpn.*, [1906] 1 K.B. 160 ; 34 Digest 550, 86.
- (2) *Hillyer v. St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820 ; 34 Digest 550, 87.
- (3) *Lavelle v. Glasgow Royal Infirmary*, [1932] S.C. 245 ; Digest Supp.
- (4) *Marshall v. Lindsey County Council*, [1935], 1 K.B. 516 ; Digest Supp.
- (5) *James v. Probyn* (1935), *The Times*, May 29, 1935.
- (6) *Strangeways-Lesmere v. Clayton*, [1936] 1 All E.R. 484.
- (7) *Bullock v. London General Omnibus Co.*, [1907] 1 K.B. 264 ; Digest Practice 878, 4185.

ACTION for damages for breach of duty and negligence.

On Nov. 14 the plaintiff was taken ill, and on Nov. 15 she was removed to the defendants' hospital at Epsom, where, after examination, a minor operation was performed on her by the defendant, Dr. Stewart. The plaintiff remained in hospital until Nov. 22, when she was discharged. She was taken home and on the same day saw her own doctor, Dr. Keble. The plaintiff complained to him of pain, but Dr. Keble attached no importance to it. On Nov. 24 she was examined by Dr. Keble and he extracted from her body a black, evil-smelling sausage of surgical gauze. He diagnosed pyelitis and cystitis.

Gilbert Beyfus, K.C., and *H. G. Robertson* for the plaintiff.

Edgar Dale and *John Russell* for the first defendants.

Thomas Carthew, K.C., and *A. A. Pereira* for the second defendant.

FINLAY, J. : This case in which I now give judgment was a case at the Kingston Assizes, which was heard on three days there and then I think two or rather more than two days more in London. It is a case, I think, of unusual difficulty, and it gave me at the time, and has since given me, very considerable anxiety. My judgment has been delayed by reason of circumstances beyond my control. The plaintiff is a married woman, aged, I think, now twenty-six ; she is herself a solicitor's clerk and is married to a solicitor's clerk. She sues the County Council of Surrey and a doctor named John Stewart. Against each of these defendants breach of duty and negligence are alleged, but the negli-

gence is different and arises to some extent, at all events, out of different facts. The negligence alleged against the doctor is, shortly put, that he left the plugging in her after an operation. The negligence against the county council is that in the hospital there was a failure to nurse her properly. It was proved and admitted that the hospital is provided and maintained by the defendants, the county council. My attention was called to various sections in the Statutory Rules and Orders No. 85, but little, I think, turns upon their precise terms.

It is now convenient to look at the statement of claim. Para. 4 is in these terms :

In breach of their duty the first-named defendants by their servants were negligent in and about the nursing, treatment and attendance on the plaintiff in that :—(i) they failed to remove the said plugging, (ii) they failed to observe and/or to report to the doctor or doctors in charge of the plaintiff's case certain symptoms in the plaintiff's condition which should have led to the discovery and removal of the said plugging. The said symptoms were an external swelling caused by the said plugging and profuse, foul, black and offensive-smelling discharge flowing from the plaintiff and the plaintiff's discomfort and inability to walk, stand or sit in a normal manner ; (iii) they failed to take the temperature of the plaintiff on the morning of Nov. 22.

Then the names of certain nurses are set out. Para. 5 is in these terms :

By reason of the said negligence and breaches of duty of the defendants or alternatively of one or other of them, the said plugging remained in the plaintiff's body for a considerable time, namely, as to part until Nov. 24, 1934, when it was removed by Dr. Keble, and as to part thereof until Dec. 2, 1934, when it was removed by Sister Nepham at the Kingston and District Hospital.

Para. 6 gives some of the particulars of allegations of injuries, and the substance of those allegations is that the plaintiff contracted pyelitis and cystitis, that she suffered a great deal of inconvenience and pain and to some extent still suffers that inconvenience and pain. Pyelitis and cystitis, it is convenient to say, were defined to me by the doctors and there was no dispute about it : pyelitis is an inflammation of the pelvis of the kidney and cystitis is an inflammation of the bladder.

It is convenient, perhaps, to dispose at once of a point which arose, although probably in the end it became quite unimportant. Counsel for the second defendant put leading questions to witnesses for the first defendants, claiming that as they were not his witnesses he was entitled to do this. Mr. Beyfus, for the plaintiff, objected to this and I ruled against Mr. Beyfus. The two defendants here were quite distinct ; the causes of action against them were quite distinct and arose to a substantial extent, at all events, out of different facts ; the answers of the two defendants were different and it seemed to me that, in the circumstances, counsel for the one defendant was entitled to cross-examine the witnesses for the other, on the simple ground that they were not his witnesses.

It would, I think, be intolerable in a case of this sort to have to decide as to each witness and each particular piece of evidence, whether it was in favour of or against the other defendant. I have thought it right to mention this matter, because it assumed a little importance at one stage in the trial, but I do not think that in the end it proved to be of any material importance.

[His Lordship stated the facts and after reviewing the evidence found that the defendant Dr. Stewart had been negligent and the plaintiff was entitled to judgment against him.]

It remains to consider the case against the county council and there questions of law arise, as also, of course, of fact. The law is contained in a long series of decisions. I may mention some of them: *Evans v. Liverpool Corpn.* (1), *Hillyer v. St. Bartholomew's Hospital (Governors)* (2), particularly per KENNEDY, L.J., at page 829; *Lavelle v. Glasgow Royal Infirmary* (3). In that case the ultimate result was that no negligence was found and, therefore, the opinions expressed were *obiter*, but the matter was fully gone into by the judges in the Court of Session, and the contrasted views which may be taken can be very well got by looking at the opinions of the majority of the court, and then at the different opinion of the Lord Justice Clerk, LORD ALNESS. Then there is *Marshall v. Lindsey County Council* (4), a decision of the Court of Appeal which is now, I understand, under appeal to the House of Lords. There is a case of *James v. Probyn* (5) decided by SWIFT, J., on May 28, 1935 (a shorthand note of that judgment was supplied to me); and there is a still more recent case of *Strangeways-Lesmere v. Clayton* (6). Now as far as I am concerned, I take the law as it has been stated by HORRIDGE, J., in that case. He there cites several authorities, including the well-known passage of KENNEDY, L.J., in *Hillyer's* case (2); he refers to the case of *James v. Probyn* (5), and it is convenient to read what SWIFT, J. says in that which is adopted by HORRIDGE, J.:

Based upon the decisions which have been cited to me and which I have just quoted, the committee of the hospital contracts with a patient who is going in there that they will provide a hospital, that is to say, an appropriate building suitable for the purpose of a hospital, with a domestic staff for the purpose of running the hospital, whom they will control for the purpose of running the hospital. They also contract that they will employ or engage competent doctors and competent nurses, but I do not think that they undertake in any way to be responsible for the way in which the doctors or the nurses perform their duties. The duties of doctors and nurses are the duties of skilled people to be carried out by skilled people, and the actions of doctors and nurses cannot be controlled in my opinion by members of a committee who do not for one moment pretend that they have the knowledge or the ability to perform these duties themselves. They do not seem to me to be there as the servants of the committee at all in the sense that the committee can control their method of carrying out their work. That being so, they are not responsible for any negligence of which they may be guilty in the way in which they do carry out their work.

In my opinion, as I have said, the law is as it was laid down by HORRIDGE, J., following SWIFT, J. I follow those decisions, and the result is that I am bound to hold that even if negligence against the nurses were proved, it would, in the circumstances of this case, be negligence in carrying out their skilled duty as nurses, and therefore negligence for which the defendant council would not be responsible.

But as detailed evidence was led, it will be more satisfactory to the parties, and it is, I think, due to the nurses concerned, that I should deal with the evidence and state the view which I have formed upon it. It is convenient first to deal with two matters which, though they were not pleaded, were to some extent relied upon. It was said that the defendant council failed in their duty to provide a competent nursing staff, because (a) the staff provided were not, in fact, competent, and (b) the ward was seriously understaffed. Both these points, in my opinion, fail, and as they are closely connected, it will be convenient to deal with them together. There were fifty-four beds in the ward; there was one staff sister, one staff nurse and five probationers. Most of the probationers were well advanced in their course, and I see no reason to doubt that they were competent to perform the ordinary routine duties of nurses, though, of course, if any difficulty arose, their duty would be to report to the staff nurse or sister. It could not possibly be held that the mere presence of probationers was any evidence of negligence. There are, I suppose, probationers in every hospital. Then as to under-staffing, it is, of course, impossible to receive in a hospital of this sort the attention which a person will receive who, if he becomes ill, is fortunate enough to be able to pay for the undivided attention of one nurse or, in serious cases, two nurses; but it is, in my opinion, not established that the defendants negligently failed to provide a staff adequate in number. I accept on this point the evidence of Sister Roberts, a witness who impressed me, that, though busy, they were not over-worked. I do not forget that about this time the matron reported that an increase of staff was required, but it would, in my opinion, be most dangerous to hold that, because an increase of staff was recommended, therefore negligence by under-staffing was established.

On a survey of the evidence, I think that both those points fail, and I turn to consider the points which are alleged in the statement of claim. The plaintiff on this part of the case gave evidence that swabbing was very perfunctory; that there was a scarcity of pads; that she was made to attend to herself before she was fit to do so; that she showed the pad to Nurse Bell, who did nothing; that she had a swelling which could be detected by anyone swabbing; that she had from the Sunday, a profuse and foul-smelling discharge, that she was unable to sit or walk in a natural way by reason of pain, and that she was sent home without her temperature being taken. On one at least of these points her

husband corroborated her. I am satisfied that her evidence on this is very considerably exaggerated. It was contradicted at every point by the evidence of nurses and, in my opinion, the plaintiff fails on the facts here. Dealing with the points as they arose in the statement of claim, it may be convenient to deal with that last point first. That is para. 4 (iii): it is alleged that "they failed to take the temperature on the morning of Nov. 22." The plaintiff's chart showed a perfectly normal course towards recovery and I can see nothing which made it necessary to take the plaintiff's temperature on that morning. As to the second point, the plaintiff was supported to some extent by her husband, but I am satisfied that she fails. Both Dr. Kendall [the anæsthetist at the hospital] and Dr. Stewart saw her several times; they saw nothing wrong and she made no complaint to them. Her temperature, as shown by the chart, pursued a perfectly normal course and gave no indication that there was anything wrong. If she was suffering in the way described the doctors must inevitably have seen it, and she must, I think, have mentioned it to them. To the same effect is the evidence of a series of nurses: Sister Roberts—I have already referred to the weight that I attach to her evidence—Nurse Bell, Nurse Carter, Nurse McKeating, Nurse Date; but perhaps most impressive of all on this part of the case is the evidence of Dr. Keble. I accept, as I have already indicated, his evidence. Much of that evidence was in favour of the plaintiff, but on this point I think his evidence was much against her. He saw her on the day she returned from the hospital. She said nothing of this black, foul-smelling discharge, and he did not discover that she was suffering from it. He told me, in fact, that he did not detect the discharge till he extracted the gauze; that is on the Saturday afternoon. It would be difficult, I think, to hold that the nurses were guilty of negligence in failing to discover that of which the plaintiff herself never complained and which was not discovered by two doctors at the hospital, nor discovered, at all events, at the first interview by her own doctor. I think that the plaintiff has exaggerated her symptoms and that she fails to make out any case on this. With regard to the first point, it may perhaps be sufficient to say that Mr. Beyfus conceded there was nothing to fix the nurses with knowledge that the plugging was in. If they did not know the plugging was put in, clearly there was no duty to remove that plugging. It is sufficient, I think, to say that with regard to the plugging the duty was that of the doctor, the failure in duty was that of the doctor, and I see no case at all against the nurses with regard to this.

I ought, perhaps, to say that I have endeavoured to refer to the more salient points in the evidence and I have endeavoured to explain as clearly as I can the grounds upon which my judgment on both these points is based. I have, I may say, followed the evidence as closely as

I could at the trial, I have repeatedly considered the whole of the evidence since. I have not attempted to mention every detail, but I have not failed to survey, as far as I could, the whole of the ground, not once, but several times.

The result, in my opinion, is that the plaintiff succeeds against the defendant Dr. Stewart, but fails, both, I may say, on the law and on the facts, against the defendant council. It remains to consider the question of damages.

[His Lordship then dealt with the medical evidence and awarded the plaintiff £250 damages with costs against Dr. Stewart and gave judgment for the defendant council with costs.]

Beyfus, K.C. : The plaintiff should be at liberty to recover against the defendant doctor the costs she is liable to pay to the Surrey County Council (*Bullock v. London General Omnibus Co.* (7)).

FINLAY, J. : Entirely different negligence was alleged against the hospital and against the doctor, although they arose out of the same matter. The acts of negligence were quite different and while I regret it, I must remember that the plaintiff has brought an action against the Surrey County Council and in my opinion failed both on the facts and in law. In these circumstances I am of the opinion I should be doing injustice if I were to order the defendant doctor to pay the costs of the successful county council, those costs relating to issues different from those in which he was interested and raising points which did not arise in his case. I know no authority to justify making the order and in my opinion the case cited has no application. In these circumstances I am bound to say I cannot make the order.

Solicitors : *R. H. Behrend & Co.* (for the plaintiff) ; *Carpenters* (for the first defendants) ; *Le Brasseur & Oakley* (for the second defendant).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

COOPER v. COOPER, PARISH (INTERVENER), WILLIAMS
(PARTY CITED).[COURT OF APPEAL (Lord Wright, M.R., Slesser and Romer, L.JJ.),
May 27, 1936.]*Divorce—Petition—Application for trial by special jury—Order by registrar for trial by special jury—Order reversed by President—Discretion—R.S.C. Ord. 54, r. 12—Matrimonial Causes Rules, 1924, r. 30 (B).*

On the application of a petitioner seeking to obtain a divorce the registrar made an order that the cause should be tried by a special jury. The President ordered that the registrar's order be set aside and that the cause should be tried by a judge alone. The petitioner appealed contending that the substantive discretion to grant a jury is vested in the registrar and is binding upon the judge:—

HELD: the substantive discretion is vested in the President and he was entitled to set aside the registrar's order.

[EDITORIAL NOTE.] The making of an order for a special jury is discretionary. The order in the first place is made by the registrar but there is an appeal to the President. The discretion, however, is vested in the President, and, on an appeal from the registrar, he can exercise the discretion of the court in a way contrary to that in which the registrar has exercised it.

AS TO THE RIGHT TO A JURY IN DIVORCE PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 10, p. 731, para. 1126; and FOR CASES, see DIGEST, Vol. 27, pp. 448, 449, Nos. 4630-4638.]

Cases referred to:

- (1) *Rugg-Gunn v. Rugg-Gunn & Archer*, [1931] P. 147; Digest Supp.
- (2) *In the Goods of Patrick* (1889), 14 P.D. 42; 23 Digest 283, 3496.

APPEAL from an order made by SIR BOYD MERRIMAN, P., reversing an order made by the registrar that the cause should be tried by a special jury. The facts are fully set out in the judgment.

Roland Oliver, K.C., and *Bush James* for the appellant and the party cited.

Norman Birkett, K.C., and *Clifford Mortimer* for the respondent.

LORD WRIGHT, M.R.: This is an appeal from an order made by SIR BOYD MERRIMAN, P., reversing an order made by the registrar of the Divorce Division. The facts need not be mentioned at any length. The petitioner is seeking to obtain a divorce on the ground of adultery, and on Jan. 29, 1936, an application was made to the registrar by the petitioner that the cause be tried by a special jury and the registrar made an order that the cause should be tried by a special jury. On Feb. 3, 1936, SIR BOYD MERRIMAN, P., ordered that the registrar's order be set aside and that the cause should be tried by a judge alone.

The only question here is whether the discretionary power of granting a jury is vested in the President or in the registrar; and if it is vested in the President whether he has exercised his discretion judicially. Now Mr. Roland Oliver has made it quite clear that his case is that the substantive power is in the registrar and that the President

is bound by the registrar's order, but if he is wrong about that then he agrees that the President has exercised his discretion judicially.

There is no absolute right in a petition based on divorce to have the matter tried before a jury. That was decided in this court in the case of *Rugg-Gunn v. Rugg-Gunn & Archer* (1). The headnote is as follows :

There is now no statutory right of a party to a matrimonial suit to insist on the trial of any issue of fact by a jury. On a petition by a husband seeking dissolution of marriage on the ground of the alleged adultery of the respondent wife with the co-respondent, the respondent counter-charged the petitioner with cruelty and prayed a judicial separation. An order having been made for the trial by a jury of the issue of adultery the Court of Appeal (affirming the decision of LANGTON, J.) refused to extend the order to include the issue of cruelty.

The Matrimonial Causes Act, 1857, s. 28, laid down that either party may insist on having contested matters of fact tried by a jury. That section has been repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, and the position now is that the court has a discretion as to whether it will grant a jury or otherwise.

The Matrimonial Causes Rules, 1924, r. 30 (B) states that :

Unless a registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a common jury and all other causes shall be heard by the court itself without a jury.

There is a note on this rule at the bottom of p. 549 in *RAYDEN & MORTIMER ON DIVORCE* (3rd Edn.), which is as follows :

Upon an application for trial by a jury in a matrimonial cause the summons shall be issued before the judge, or the registrar shall refer it to him, except where the only issues are adultery and/or damages.

Now here there is adultery only and no damages are claimed. What is the effect therefore of the words : " Unless a registrar shall otherwise order " ? Is the discretion a substantive power vested in the registrar, and therefore binding upon the judge or is it liable to appeal, and if the judge does not think that the discretion has been exercised judicially may he review the order ? Now this court will not interfere with the discretion of the President unless the court is satisfied that it has not been exercised judicially, and if this substantive discretion is in the registrar then this court will be bound by the order of the registrar unless the discretion is not exercised judicially.

The substantive discretion is vested in the President. R.S.C. Ord. 54, r. 12, seems to put the master and the registrar in the same position. The order is as follows :

In the King's Bench Division a master, and in the Probate Divorce and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act or these rules may be

transacted or exercised by a judge at chambers, except in respect of the following proceedings,

and then follow the exceptions. LOPES, L.J., in *In the Goods of Patrick* (2) at pp. 44 and 45 discussed the position of the master and registrar as follows :

There is some difficulty in the wording of the rules. R.S.C. Ord. 54, r. 12, mentions the registrar, and puts him in the same position as a master, and under that rule he had jurisdiction to make the order which he made in this case. Then R.S.C. Ord. 54, r. 21, provides for an appeal from the master and limits the time within which it must be brought, but does not mention the registrar. Then R.S.C. Ord. 71, says that "master" means a master of the Supreme Court of Judicature. We are informed that the practice in the Probate Division has been to treat appeals from the registrar as included in rule 21. There appears to have been a slip in framing the orders, but I think it must have been intended that "master," in that rule, should include the registrar, and in my opinion the practice ought not to be disturbed.

This passage clearly indicates that masters and registrars are on the same footing. It is clear that the powers of the masters and registrars are the powers of the judge and what has to be considered here is the discretion of the President, and not that of the registrar. In this case there is no ground for saying that the President has exercised his discretion in other than a judicial manner. This appeal, therefore, is dismissed with costs.

SLESSER, L.J. : I agree.

ROMER, L.J. : I agree.

Solicitors : *Withers & Co.* (for the appellant and the party cited) ;
G. H. Drury (for the respondent).

[Reported by W. J. ALDERMAN, Esq., *Barrister-at-Law.*]

NAWAB MAJOR SIR MOHAMMAD AKBAR KHAN v. ATTAR SINGH.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Atkin, Sir Lancelot Sanderson, Sir Shadi Lal, Sir George Rankin), **April 6, 1936.**]

Bills of Exchange—Promissory note—Deposit receipt stating terms of repayment—Whether promissory note.

The plaintiff deposited the sum of Rs.43,900 with the defendants and received a deposit receipt in the following form: "This receipt is hereby executed by [defendants] for Rs.43,900 . . . received from [a firm] for and on behalf of [the plaintiff]. This amount to be payable after two years. Interest at the rate of Rs. 5-4-0 per cent. per year to be charged." This document was stamped as a receipt:—

HELD: the document was a deposit receipt and not a promissory note. It evidenced the deposit of the sum mentioned and that it was to be repayable on demand after the expiration of two years from its date.

[EDITORIAL NOTE.] The document in question here contains no undertaking to pay and an implied promise to pay is not sufficient to make a document a promissory note. It was held also that it was clearly not a negotiable instrument and not intended to be such. A somewhat similar instrument was held not to be a promissory note in *Taylor v. Field* (1847), 2 New Pract. Cas. 221; 6 Digest 40, 293. In this matter the Indian and English law are virtually identical; and as to Indian law, it should be noticed that the case of *Manick Chund v. Jomoona Doss* (3) is overruled.

AS TO THE ESSENTIALS OF PROMISSORY NOTES, see HALSBURY, Hailsham Edn., Vol. 2, p. 606, para. 828; and FOR THE CASES, see DIGEST, Vol. 6, pp. 37-41, Nos. 365-297.]

Cases referred to:

- (1) *Casborne v. Dutton* (1727), Sel. N.P., 13th Edn. Vol. I. 329; 6 Digest 38, 273.
- (2) *Mortgage Insurance Corp'n. v. Inland Revenue Comrs.* (1888), 21 Q.B.D. 352; 6 Digest 25, 144.
- (3) *Manick Chund v. Jomoona Doss* (1880), I.L.R. 8 Calc. 645; 6 Digest 39, Case (s).

APPEAL from the Court of the Judicial Commissioner N.W. Frontier Province. The facts and the nature of the appeal are fully stated in the judgment.

W. Upjohn, K.C., *W. Wallach* and *J. M. Pringle* for the appellant.
Leslie De Gruyther, K.C., and *M. H. Rashid* for the respondent.

The judgment of their Lordships was delivered by LORD ATKIN.

LORD ATKIN: This is an appeal from a decision of the court of the Judicial Commissioner N.W. Frontier Province allowing an appeal from the subordinate judge of Mardan who had made a decree in favour of the plaintiff. By the decree on appeal the plaintiff's suit was dismissed with costs.

The suit was commenced by a plaint dated July 25, 1929, based upon a deposit receipt dated Apr. 1, 1917, to recover the principal sum of Rs.43,900 said to have been deposited with the defendants on deposit

account with interest at the agreed rate of $5\frac{1}{4}$ per cent. per annum. The alleged deposit receipt bore only an affixed stamp of 1 anna, and the subordinate judge in framing the issues stated as the first issue the question whether the document fell within the definition of a promissory note and was it therefore not admissible in evidence. Without hearing any evidence as to the circumstances in which the document came into existence he decided this issue as a preliminary point in favour of the defendants, holding that the document was a promissory note, was improperly stamped, and therefore was inadmissible in evidence for any purpose under the Indian Stamp Act (1899, Act II), s. 35. Their Lordships will discuss this decision later. Leave, however, was given to the plaintiff to amend: and on Jan. 2, 1931, the plaintiff presented an amended plaint alleging that on Apr. 1, 1917, it was agreed between the plaintiff and the defendants that the plaintiff should deposit Rs.43,900 with the defendants for a period of two years with interest at $5\frac{1}{4}$ per cent. per annum: and that at the expiration of the two years the amount was allowed to remain on deposit with the defendants on the condition that the plaintiff would be at liberty to recover the amount with interest at any time he liked, and that interest would be credited annually in the books of the defendants. The defendants in their respective written statements denied that there was any agreement apart from that recorded in the inadmissible promissory note. They denied any agreement in 1919, they pleaded the Statute of Limitations and finally pleaded that they had repaid the money in 1919. Further issues were raised as to the liability of some of the defendants as members of the alleged joint Hindu family as members of which they were sued. As to these issues no question now arises before their Lordships. The subordinate judge does not appear to have thought it necessary to frame a new issue to meet the allegation in the amended pleadings of the agreement made in 1919. He heard the evidence on both sides and eventually gave judgment for the plaintiff. The plaintiff's evidence was that when his father died in 1914 he had Rs. 25,000 deposited with the defendants which he the plaintiff had withdrawn in 1914, and had afterwards re-deposited in 1916 while he was engaged in the war. On his return from the war in 1917 he wished to deposit with the defendants whom he knew to be a very reliable firm of moneylenders a further sum of Rs. 50,000. He sent for the two principal defendants, father and son, and told them he wished to deposit with them the sum named. They said they could not take so large a sum and could invest only Rs.43,900 in a certain business. They asked him not to fix the interest higher than 7 annas, i.e., $5\frac{1}{4}$ per cent. per annum. (The interest on the Rs.25,000 had been 6 per cent.). "They said they could not repay me the money within two years: after that they would repay me at any time on demand after receiving due notice." He sent his accountant Abdulla

with them to his regular bankers Duni Chand Hari Chand who conducted all his receipts and disbursements. Later Abdulla handed him the receipt in question, which admittedly was prepared by the defendants. The plaintiff then proceeded to give evidence as to the 1919 transaction. He said that he was on duty as a martial law commander near Lahore in Apr., 1919: and that on Apr. 21 or 22 on hearing of the death of his uncle he came home to Hoti on leave. While there the defendants, the father and possibly the son, came to him. They said that the two years had elapsed "They asked what should be done about the money. I told them I did not then want to withdraw that money and would like to keep it with them as the times were uncertain. I told them to credit the interest and pay it to me when I wanted it. They agreed to this." Before the trial the defendant Hira Singh had died, a very old man. The son, Attar Singh, said that in 1917 he had taken some land on mortgage from one Hamish Gul. He had acquired the land by pre-emption and Rs.42,500 had to be deposited as pre-emption money, which was found by the defendant Attar Singh. He took a loan from the plaintiff for Rs.43,900 at $5\frac{1}{4}$ per cent. interest, wrote a promissory note for this and gave it to the plaintiff himself. No mention was made of the money being placed on deposit. He made no agreement with the plaintiff after the expiration of two years to keep the money on deposit. After two years he repaid the money and the interest. His father and he both went to the plaintiff and his father paid the money.

The defendants' story about the payment of the money was not accepted by either of the courts in India. The absence of any receipt, the non-return of the alleged promissory note, and the failure by the defendants to produce any books dealing with the transaction amply support the finding of the trial judge in this respect. The defence therefore had to rest upon the Limitation Act, a defence meritorious enough where the defendant has been left in long enjoyment of property: or where from the lapse of time the original existence or the discharge of an obligation is left in doubt but void of all merit where as here an original obligation is admitted and a fictitious discharge is falsely alleged. Nevertheless it must be carefully examined, and the plaintiff's rights determined accordingly. The articles of the Limitation Act which are relevant are "59. For money lent under an agreement that it shall be payable on demand: Three years from the time when the loan was made." "60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable: Three years from the time when the demand is made." To which should be added article "120. Suit for which no period of limitation is provided elsewhere than in this schedule: Six years from the time when the right to sue accrues."

It is, therefore, necessary to determine whether this was money lent by the plaintiff to the defendants : or whether it was deposited under an agreement that it should be payable on demand. An attempt was made by the plaintiff to establish that the money was deposited with the defendants as bankers payable on demand. The trial judge accepted this view, but their Lordships are not prepared to differ from the judicial commissioner's court in this respect. That the defendants were money-lenders is admitted, but there is no satisfactory evidence that they carried on business as bankers, or indeed how such business is carried on in the North-West Frontier Province : and in the absence of such evidence it would be unsafe to affirm the trial judge's finding. Was this then a loan or was it a deposit payable on demand ? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the deposittee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the deposittee to repay. It is unnecessary, however, in this case to decide any question as to implied conditions, for the case of the plaintiff rests on an express stipulation made in 1919.

Before however coming to a final decision as to the rights of the parties it seems necessary to discuss the point decided by the trial judge that the document signed by the defendants in 1917 was a promissory note and inadmissible because improperly stamped. No objection to this ruling appears to have been taken on the hearing of the appeal : but their Lordships thought right to allow the point to be raised before them, as it involves no question of fact : on the other hand the determination of the issue as to whether any and what agreement was made in 1919 is much embarrassed by the court having to deal with a fund as it were *in vacuo*, with no evidence admissible as to how there came to be any sum in the hands of the defendants at that date. Having heard the discussion their Lordships have come to the conclusion that the document was not a promissory note. The Indian Stamp Act does not suffer from the defects of the English Stamp Act in ignoring the definitions in the Bills of Exchange Act, 1882, and enacting a definition of its own. The Indian Act, article 49 imposes a duty on " promissory notes " as defined by sect. 2 (22) and by that subsection " promissory note " means a promissory note as defined by the Negotiable Instruments Act, 1881. By the latter Act sect. 4 a " promissory note " is an instru-

ment in writing (not being a banknote or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. There follow illustrations lettered (a) to (h) of which three only need be set out.

A. signs instruments in the following terms :

(a) I promise to pay B. or order Rs.500

(b) I acknowledge myself to be indebted to B. in Rs.1,000 to be paid on demand, for value received.

(c) Mr. B. IOU Rs.1,000.

The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c) are not promissory notes.

It is necessary to refer to sect. 13 : " A negotiable instrument means a promissory note . . . payable either to order or to bearer."

Explanation.—A promissory note . . . is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not convey words prohibiting transfer or indicating an intention that it shall not be transferable.

The instrument in question in this case is according to the authorised translation in the following terms :—

May God protect us.

This (one) receipt is hereby executed by Bhai Hira Singh Attar Singh Kharbanda, residents of Hoti for Rs.43,900 (Forty three thousand and nine hundred rupees) half of which amount comes to twenty-one thousand nine hundred and fifty, received from the Firm of Lala Duni Chand Lala Hari Chand Sethi for and on behalf of Captain Mohammad Akbar Khan of Hoti. This amount to be payable after 2 (two) years. Interest at the rate of Rs.5-4-0 (Rs. five annas four) per cent per year to be charged.

Dated this 20th day of Chetar (first month of the Hindu Calendar year) Sambat 1974 corresponding to Apr. 1, 1917.

Stamp has been duly affixed.

(Sd.) Hira Singh, Kharbanda.

(Sd.) Attar Singh, Kharbanda.

If this document is otherwise within the definition of a promissory note, it would seem that it must be negotiable, for there appear to be no words prohibiting transfer or indicating an intention that it should not be transferable. It must be admitted that it would be a somewhat unusual visitor in the accustomed circles of negotiable paper. It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice, for the third illustration indicates that an IOU

is not a promissory note, though of the implied promise to pay there can be no doubt. The second illustration, however, seems to show that the express words "I promise" or "I undertake" are unnecessary. The form of words is taken from an early English case, *Casborne v. Dutton* (1), where, according to the learned author, the court stated that the words "to be paid" in the document there sued on amounted to a promise to pay: observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words.

Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who were experienced moneylenders did not draw it on paper with an impressed stamp as they would have to if the document were a promissory note, and that they affixed a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt even if coupled with a promise to pay it is not a promissory note. This view of the meaning of a promissory note appears to coincide with the grounds of decision in *Mortgage Insurance Corporation v. Inland Revenue Commissioners* (2), where the English Court of Appeal found themselves bound to give a restricted meaning to the much wider definition in the English Stamp Act. It will have the effect of overruling some decisions in the Indian courts, notably the case of *Manick Chund v. Jomoona Doss* (3), where the defendant had given a sale note to his customer recording a resale to him of certain rupee paper previously bought from the customer, and bringing out a difference expressed to be payable on a day in the next month. The document was a sale note coupled with an account, and in no way resembled a promissory note, or anything capable of being a negotiable instrument. Once it is decided that the document has not to be stamped as a promissory note, their Lordships are not called upon to decide whether the document otherwise bears a sufficient stamp. If that question had been raised it is sufficient to say that if improperly stamped it could have been stamped after execution under a penalty.

In all the circumstances of this case their Lordships come to the conclusion that there was no ground for reversing the decision of the trial

judge in favour of the plaintiff. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Stanley Johnson & Allen* (for appellant); *Nehra & Co.* (for respondents).

[*Reported by S. P. KHAMBATTA, ESQ., Barrister-at-Law.*]

SYMES AND JAYWICK ASSOCIATION PROPERTIES LTD. v. ESSEX RIVERS CATCHMENT BOARD.

[KING'S BENCH DIVISION (Atkinson, J.), **April 21, 22, 23, 24, 27, 28, 29, 30, May 1, 4, 14, 1936.**]

Sewers and Drains—Land drainage—Sea-wall—Removal of sluice—Land Drainage Act, 1930 (c. 44), ss. 1 (3), 7, 34.

A small area of land on the seaward side of a sea-wall was protected from the sea by a ridge of shingle and drained by a culvert or sluice through the sea-wall leading into a dyke which ran into the main drainage river of the whole neighbourhood. The defendants were under the Land Drainage Act, 1930, the authority to control the catchment area embracing the land in question. Before the constitution of the present Catchment Board, the old drainage board had approved of the placing of the sluice box in the wall and knew of the contemplated development of the land in question. They also knew that at certain times sea-water came through the sluice and thence into the main river. The land behind the sea-wall was lower in level than the land to seaward thereof and the plaintiffs claimed a right to drain into it as a natural right vested in the owner of higher land. The contemplated development of the property took place, and the first plaintiff became the owner of two plots on the estate. In 1935 the defendants removed the culvert or sluice altogether and filled the hole in the sea-wall caused by such removal, making the sea-wall continuous. The result of this proceeding was to cause the area in question to be flooded and severe damage was done to the property thereon. The defendants pleaded that they had acted in accordance with their statutory duties, and that the sluice was removed in order to prevent sea-water getting into the main river. They also contended that no one could claim the right to maintain a breach in a sea-wall:—

HELD : (i) there was a natural right in the owners of this land to drain into the dyke leading to the main river and that right included the right to drain salt water that came upon the land from the sea.

(ii) the conveyance to the first plaintiff vested in him an implied right to drain in that way by virtue of L.P. Act, 1925, s. 62, as a continuous and apparent *quasi*-easement.

(iii) the defendants had no power under the Land Drainage Act, 1930, ss. 1, 34, to remove or block up the sluice.

(iv) the plaintiffs and their predecessors in title were entitled to maintain the sluice as a breach in the sea-wall so long as its existence was not prejudicial to the owners of adjoining land.

(v) in the circumstances the defendants had acted harshly and unreasonably and the plaintiffs were entitled to an injunction, including a mandatory order for the replacing of the sluice, and an inquiry as to damages.

[**EDITORIAL NOTE.** The chief interest in this case is the consideration of the duties of drainage authorities under the Land Drainage Act, 1930. The authorities

alleged that they removed a sluice for the protection of a "main river," but the effect was to inundate a considerable area of developed land. The authorities further strenuously asserted that no one whatever has a right to make any breach in a sea-wall. Both these matters are decided against the drainage authorities. The right of the owner of property at a higher level to drain his land on to that of the owner at a lower level is also considered.

AS TO SEA-WALLS AND DEFENCES, see HALSBURY, 1st Edn., Vol. 28, Waters and Watercourses, pp. 382-384, paras. 717-720; and FOR CASES, see DIGEST, Vol. 44, pp. 79-83, Nos. 606-664. FOR THE LAND DRAINAGE ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 529.]

Cases referred to :

- (1) *Gibbons v. Lenfestey* (1915), 84 L.J.P.C. 158; 113 L.T. 55; 19 Digest 147, 1003 (iii).
- (2) *A.-G. v. Tomline* (1880), 14 Ch. D. 58; 44 Digest 79, 606.
- (3) *Greenwich Board of Works v. Maudslay* (1870), L.R. 5 Q.B. 397; 26 Digest 292, 236.
- (4) *Howard-Flanders v. Maldon Corpn.* (1926), 90 J.P. 97; Digest Supp.
- (5) *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; 26 Digest 488, 1997.

ACTION for (a) a declaration that the defendant board is not entitled to stop up the sluice or culvert in the counter-wall abutting upon the foreshore at St. Osyth in the County of Essex, which sluice or culvert passes through the portion of the counter-wall adjacent to Essex Avenue, Jaywick Sands, or otherwise so to obstruct the same as to cause a nuisance or injury to the plaintiffs; (b) an injunction restraining the defendant board from so stopping up or obstructing the sluice or culvert; (c) a mandatory order upon the defendant board to remove the existing obstruction of the sluice or culvert and to re-open same for the drainage of water; (d) damages for nuisance; (e) damages for trespass.

The defendants alleged that the stopping up and obstruction of the sluice was necessary for the protection of a "main river" under their jurisdiction and was within their statutory powers.

The facts and arguments are fully set out in the judgment.

R. M. Montgomery, K.C., and *G. O. Slade* for the plaintiffs.

Gilbert Beyfus, K.C., and *Geoffrey Hutchinson* for the defendants.

ATKINSON, J.: A few miles west of Clacton in Essex there is an extensive area of low-lying land, much of which is and has been for a very long time protected by sea-walls. The area with which this case is concerned was not so protected. It is known as Tendring and consisted before its development of saltings. It immediately adjoins the foreshore, extending from east to west along the foreshore some eight hundred yards. The sea-wall to the east runs close to the sea, but when it reaches Tendring at a point called Lion Point, it suddenly turns inward to the north, makes a detour and returns to the sea at the west end of Tendring, giving the land the shape of a flattened horseshoe,

some 270 yards deep in the neighbourhood of the centre. Beyond the sea-wall, and to the north of it, is some low-lying land or marshes known as "Grassland." The northerly and easterly boundaries of the Grassland are also sea-walls. The Grassland area is therefore entirely enclosed by sea-walls. It is marshy and probably has for centuries been drained as follows: to the west is Whyres Hall Farm, and there runs through lands belonging to that farm, from north to south, a large dyke or watercourse, which empties into the sea at a point about 350 yards to the west of Tendring. The water from the dyke there passes through or under the sea-wall by means of a sluice known as Bond's Sluice. This watercourse is a main river under the Land Drainage Act of 1930 and Order 875 made thereunder. The Grassland is drained by several dykes, of which the only important one for the purposes of this case is immediately to the north of the sea-wall. This dyke runs to the west, and when it reaches the junction of the sea-wall with the counter-wall at a point which has been spoken of in this case as "A," the water from the dyke passes through a sluice, either through or under the sea-wall, into another dyke which runs along the northerly side of the counter-wall. That dyke starts well away to the east and runs along that counter-wall, ending up by running along a section of the sea-wall, and runs into the main river dyke just at Bond's Sluice. Thus the water from the Grassland, which runs into this more northerly dyke at the point "A," finds its way into the main river close to Bond's Sluice and thence into the sea. The point "A" is, I think, about 300 yards from Bond's Sluice.

Running along the bottom or southerly side of the sea-wall on Tendring is a ditch, which, I gather, is some three feet deep. It extends only along the flattened part of the horseshoe. It is about 500 yards long and ceases at both ends just about where the sea-wall turns again towards the sea. The surface of Tendring falls from the sea, that is, from the south, towards the ditch, and there is also a slight fall from the east towards the west, or, to be more accurate, towards a little west of north. Close to the high-water mark there was, before 1931, a ridge of shingle, varying probably from 11 to 13 feet above Ordnance Datum. The surface gradually fell for about half-way towards the ditch, and the height of the land on the south side of the ditch being on the average just over 8 feet above Ordnance Datum. At the west end of the ditch, it was lower; the height being given as 7.87 feet. All these measurements must, I think, be taken as more or less approximate, because so much must depend upon the precise spot at which they are taken; but I think they have been fairly taken and that those measurements do indicate this slight fall to the west. Clearly, judging merely from appearances, surface water on Tendring, coming whether from the heaven or from the sea, would flow down towards the ditch, where the tendency would be for it to move to the west towards the sluice. Indeed, the evidence,

I think, was quite clear that, if you wanted to drain this section and the ditch, the natural place at which you would endeavour to do it would be at the west end of the ditch, which we have spoken of in this case as point "B." I ought to say now that all through this case we have spoken of the dyke or ditch which is on Tendring to the south of the sea-wall as the "ditch," and we have spoken of the dyke which is north of the wall as the "dyke." That does not indicate, I think, any difference in size, structure or description. These expressions have been used merely to distinguish one from the other.

It seems common ground that these walls and the dykes of which I have spoken are centuries old, but there is not the same agreement about the age of the ditch. I myself can see no reason for saying that the ditch is not equally old, but, of course, nobody knows. For a very long period of time (a period, perhaps, going back to the building of the sea-wall; possibly more recent), the water in the ditch was conducted by a brick culvert through the ground under the sea-wall at the west end of the ditch at point "B," a culvert which enabled the water from the ditch to drain into the dyke behind. That water then travelled, in the way I have described, along towards the sluice at point "A" and thence into the main river at Bond's Sluice, and so into the sea. This culvert was, of course, at the bottom of the ditch. The end of this culvert could still be seen early this century, at any rate if you looked for it. I have no doubt that for quite a time before 1931 very little water was getting through the culvert.

The surface of Tendring was sand, or, I suppose, nearer to the ridge, sand, stone and shingle, and below the sand there was and is a bed of clay. This bed of clay was fairly level. The curved surface was due to a greater depth of sand and shingle near to the sea, and as that covering of sand and stone got less, so the surface of the land got lower. At what is now known as Essex Avenue the level of the clay was about or very nearly a foot lower at the ditch end than at the sea end, but at the other end of Tendring, towards Brooklands Avenue, there was very little in it. Indeed, one of the sections in Mr. Johnstone's plans shows, if anything, that the fall of the clay was very slightly the other way and towards the centre of Tendring; although the clay seemed to fall a little towards the centre, it then rose again slightly towards the ditch, and the lowest part there was somewhere about midway between the ditch and the sea. Generally speaking, the level of Grassland, the marshes, was at least two feet lower than the lowest level of Tendring. I think an average of twelve levels gave a height of 6.06 feet, and the plans show that the bottom of the dyke was a little over two feet lower than the bottom of the ditch. High spring-tides rise to a height on occasions of over $10\frac{1}{2}$ feet. The highest, I think, during the last fifteen months was 10.9 feet, and it is clear that at high spring-tides, if there

was wind or swell from the sea, it must have quite often broken over the ridge and caused sea-water to come on to the land. Some of the water would have been absorbed by the sand, but when the sand got saturated it would run towards and into the ditch, and gradually ponds used to form against the sea-wall, when the culvert had ceased to be effective. I am quite satisfied that there was, at any rate, in recent times, no way out for this water once the culvert failed. I think that the culvert must have been put there to let the water in the ditch out in the way I have described. Whatever the origin of the culvert, whatever the cause of it, whatever was in fact behind the minds of people when it was put there, I have not the slightest doubt about what it did. What it did was to carry the surface water from Tendring into the dyke on Grassland.

On Feb. 25, 1930, Mr. Bond, who was then the owner of Cockett Wick Farm, sold part of it, Grasslands and Tendring, to a company which we have called Lakes, Ltd. I think the only shareholders were Mr. Bond and Mr. Stedman, and later Mr. Stedman acquired Mr. Bond's shares and became really the only person interested in these two plots of land. When he and Mr. Bond purchased, their idea was to put up bungalows or chalets on Tendring, and to form a lake on Grassland. The latter part of the scheme came to nothing, but in the winter of 1930 and 1931 for some weeks Mr. Stedman had men, and I think a surveyor, marking out plots of land for sale on Tendring. Some eight hundred plots were marked out and avenues or roadways, and it became perfectly obvious, I presume, to anybody in the neighbourhood, anyone who saw the place, that a building scheme was afoot.

About Feb., 1931, Mr. Stedman and his architect gave their minds to the question of the drainage of Tendring. They thought that the water in the ditch, into which obviously the surface water went, must have an escape into the dyke behind, and, feeling about at the west end of the ditch, the men who were doing the work came across the remains of a culvert. They had propped a couple of feet into the bank of the ditch before they came across it. It was covered with mud and herbage and could not be seen. Mr. Stedman then came to the conclusion that he could not repair this culvert, and that the best method of draining the ditch was to put a new one in, and to that end he cut the sea-wall down to the level of the old culvert; cut down the sea-wall and then dug into the main ground below it, took out the culvert, intending to put in an elm sluice. When the men came across the old culvert, it had collapsed. It had been built of brick, and was built in a way, or, at any rate, with a substitute for mortar, which indicated that it had been there for a very long time.

I find as a fact that the drainage board for that area, and Mr. Hutley personally, as owner of Cockett Wick Farm, both knew and approved of the placing of the box sluice under the sea-wall. I find that they

knew and contemplated that sea-water would at times come through it from the ditch and they knew of the contemplated building on and development of Tendring. I am quite satisfied that consent was given with full appreciation of the position.

On June 24, 1931, Lakes, Ltd., conveyed the Tendring estate, including the sea-wall and box sluice, to Mrs. Suffling. Mrs. Suffling was a daughter of Mr. Stedman, and the conveyance was made to her on trust for him. Any purchase money that was paid, if any was paid, came from him, and thereafter, at any rate, the legal title, I suppose, was in Mrs. Suffling and the beneficial interest was in Mr. Stedman. I have no doubt that the result of the severing of the ownership of the two lots of land involved that there was an implied grant of the right to send surface water, including sea water, through the sluice and to discharge it into the dyke at the point "B." It was a continuous and apparent *quasi*-easement. I refer to GALE, p. 31. I think that the right also passed under the Law of Property Act, 1925, s. 62. There are a number of words used descriptive of what is to be deemed to be conveyed, including words such as "watercourses," and "rights of any kind." It seems to me beyond question that *prima facie*, except and in so far as the *prima facie* position may be varied by the fact that the sea-wall was involved, this *quasi*-easement passed both as a continuous and apparent *quasi*-easement apart from the Act and also by virtue of sect. 62 of the Act. I have no doubt that the right inured for the benefit of all the land conveyed.

There was also this point upon which Mr. Montgomery relied. He said that there is a natural right for higher land to drain its surface water on to lower land. The case he relied upon was *Gibbons v. Lenfestey* (1). I do not want to read more than is necessary, but there the Privy Council was considering the question in connection with the law of Guernsey, which for this purpose does not differ from ours. LORD DUNEDIN says, at p. 57:

The law may be stated thus: Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water, which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property. . . . The right, however, of the superior proprietor is not quite absolute. The limits cannot be defined by definition, but each case must depend on its own circumstances. It would not, for instance, be within his right to introduce water which was foreign to the land—e.g., by procuring a pipe-supply or draining another watershed—and then insist that all the water so brought on the land should be received by the inferior proprietor to his detriment. . . . Nor does the mere fact of building forfeit the right. No doubt a proprietor may not build on the extreme verge of his property and then throw water off his roof on to the

neighbour's land. . . . But if the water from the roof of a building falls on the proprietor's own grounds it does not cease to be natural water, but must be received by the lower proprietor as the water was received before the building was there.

That would seem to describe very aptly the position here, and I think that on the severance of these two plots of land that the higher plot, that is, the Tendring estate, did at once become possessed of this natural right of drainage surface water on to the lower land.

A very ingenious point was raised by Mr. Hutchinson in connection with that. He said that only applies to land in so far as it has been left at its natural level. It was said it was very likely, and indeed must have been so, before these sea-walls were built all this land was the same level, and that the change in level has come about in this way, that the sea-water continually flowing over Tendring has kept it nice and moist like a wet sponge and kept the level up, but the land which has been protected by the sea-wall behind, never getting any sea, has proceeded to dry up and shrink and fall. That is another theory which may have something in it or not, but there is no evidence of it, and it is so singularly inapplicable to the circumstances, because the Grassland, so far from being dry, is marshy and, indeed, is known as marshlands. Therefore, there is no evidence that that land has ever become dry. The dyke has always been full of water, and draining, so far as one knows, the water from Grassland, so that there would be no reason why the dyke should proceed to fall some two or three feet. I cannot accept that as something which has been proved in this case. I think that I am bound to assume that the natural levels of the land are as we find them. If there has been any change, it has not been a change due to any act, I imagine, of the owners of Tendring. I am bound to assume, at any rate in the absence of proof to the contrary, that the levels are more or less natural and that Tendring must have always been at a higher level than the marshlands behind.

The next event was this. On Oct. 30, 1931, a plot, No. 32, Essex Avenue, was conveyed to the plaintiff, Mr. Symes, and on Dec. 2 the second of these plots, No. 30. Essex Avenue is the avenue which runs from the sea to the ditch right opposite the sluice at point "B." In my opinion, the benefits of the rights which were then appurtenant to Tendring passed to him in so far as those plots were concerned. I do not think that there is any doubt about the law on that point, that if an easement is attached to a dominant tenement, the mere splitting up of the ownership of the dominant tenement does not affect the continued existence of the easement, and I cannot see why the same rule should not apply to anything passed under the Law of Property Act, 1925, s. 62, nor can I see why the natural right should in any way be affected.

In the meantime, the defendant board had come into existence. It was a board constituted under the Act of 1930 to control the catchment

area embracing the lands in question, and all drainage powers in relation to the main river became vested in an internal drainage board. The old drainage boards disappeared, and for the time being apparently two boards took their place, the internal drainage board and the catchment area board ; all powers relating to main rivers being vested in the catchment area board and the residue of the powers going to the internal drainage board. At some date in this year—it is irrelevant for this case, but it is a fact—all the powers of the internal drainage board, I am told, were vested in the defendant board. I think that was Mar. 2 of this year.

When the catchment area board was formed, Mr. Smith and three or four members of the old drainage board became members of the defendant board. As a matter of fact, he is now the chairman of the defendant board.

Towards the end of 1931 the defendant board considered the matter of this sluice. A number of the board came and inspected it, and it was suggested by the board that a penstock should be fitted to the south end of the sluice so that it should be possible to control the outfall of sea-water if and when it was thought desirable. Mr. Stedman agreed to this. The minutes of the board show that this matter was before them on Oct. 23, and the minute there records the suggestion of the engineer that Mr. Stedman should be asked to provide a screw-down penstock. It is interesting to note that there is a minute also recording the fact that the tidal flap valve at Bond's Sluice was entirely broken down. On Nov. 13 the engineer was instructed to examine the work at Mr. Stedman's sluice, which Mr. Stedman had reported as having been carried out. There is no doubt whatever that the penstock was fitted, and that the sluice with this penstock was accepted by the defendant board. Mr. Smith, the present chairman, accepted this, and I find it as a fact, in so far as it is a question of fact, that the sluice became an existing drainage work there with the consent and approval of the defendant board for the purpose of draining all the land on the sea side of the sea-wall, namely the Tendring section. It was common knowledge that the estate was being developed and built upon ; eight hundred plots were marked out, a number had been sold and chalets were going up. It must not be forgotten that the land was within the defendants' drainage area. I also accept the evidence that it was for the good of the sea-wall that water should not be allowed to accumulate against it. I find as a fact that the presence of the sluice was in no way inconsistent with the rights of the Crown or the public or the safety of the lands in the neighbourhood. At that time the passage of sea-water through the sluice was of no importance, since before 1922 Bond's Sluice had been out of repair. The tidal flap was broken and was valueless. The end of the sluice was covered by the sea at every

high tide, not merely spring tides, and the sea flowed through the sluice freely into the main river and the dykes running from it to the east. A little more or less coming on odd occasions through the box sluice and then to the sluice at point "A" could, of course, make no difference.

Mr. Symes, the plaintiff, was no party to the negotiations between Mr. Stedman and the defendant board in Nov. and Dec., 1931. So far as I know, he knew nothing whatever about them, and it is a question with which I do not think it is necessary to deal, but it is a question which certainly could be discussed as to how far the rights which he had acquired could be varied by any agreement between Mr. Stedman and the board. At any rate, the penstock was then fitted to the sluice, and I repeat that construction was then a drainage work, something which did the work of draining, and it was there with the express approval of the defendants.

So matters remained. The estate was fully developed. Every building that was put up was put up with the consent and approval of the local district council; there was no suggestion of breach of bye-laws, or anything of that kind, and a sea road, known as Brooklands Road, was built by Mr. Stedman. Brooklands Road ran right along the top of what had been the ridge, and a series of narrow roads ran down from it to the ditch. On either side of those roads were constructed chalets or bungalows in blocks of four, and there were pathways joining up the various roadways, and that was the method in which the estate was developed. Brooklands Road, as I have said, was built along the top of the ridge. It was fifteen feet wide and was well and strongly made. The lowest point is somewhat close to the east end, and is 11.7 feet above the Ordnance Datum line, and probably—I am, again, taking this from the defendant's map, which was prepared by Mr. Johnstone—the highest point is about fourteen feet. Opposite the end of Essex Avenue it was about twelve feet high. It was a very much more effective barrier against the sea than the shingle ridge. The evidence, I think, is conclusive that since the road was made the sea has but seldom come over it. I am quite satisfied on the evidence that the coming of the sea-water on to the land in any quantities that mattered or could reach the ditch only happened on very, very rare occasions. I think myself that I ought to accept, and I do accept, the evidence of a number of witnesses who have been called, and who say that the water used to come over at high spring tides, emphasising the word "high," especially if there was any wind, waves or swell helping to bring the water on. At any rate, the evidence does show this, that the coming of the water before the making of the road in 1931 on to Tendring was not a rarity, but was something which, at any rate, was not uncommon, and that large pools used to form and accumulate against the sea wall during recent years at a time when the culvert was not working particularly

well, if at all. The point of importance, and the only point of importance, and upon this point there is no difference, I think, between the evidence given by one witness and another, is that after the road was made there was far less sea-water coming to the ditch than before the road was made. That, I think, is beyond question.

Mr. Johnstone, who was called by the defendants, gave some figures—which I have no reason for not accepting; I do not know that anybody has checked them, but I am prepared to accept them—which have their bearing upon one question with which I have to deal. He said the area of Tendring—and I took it he meant by that the area which was drained by the ditch and sluice—was 1,262,590 square feet; that the area of the roads, excluding Brooklands Road, was 72,384 square feet; that there were patches of concrete, sometimes under a house, or perhaps sometimes in the yard or garden, and adding all that up, that came to 57,572 square feet; that pathways, as distinct from roads, came to 214,677 square feet. If we deduct 37,800 square feet, which was the area of Brooklands Road, from the 1,000,000 odd square feet, we get an area of 1,224,790 square feet, of which 344,633 square feet of surface has been changed, in other words, has been changed into a concrete surface or a road surface. I attach no weight to the presence of the houses; the houses did not rest on the ground; the houses were all raised, I think, some two or three feet from the ground, and except in so far as the concrete work appeared under those houses, the surfaces were in their natural state. That means this, that well over two-thirds of the old surfaces remain unaffected. Alongside some of these roadways some small gullies had been fixed and a water supply was brought to the land by one tap, which I think was somewhere in the centre of the land to which people could go for drinking water or, indeed, any water they wanted for washing up, cooking or the like. These facts were relevant to the question whether and, if so, to what extent, the burden of this easement or natural right or right which passed under the Act, has been increased by what was done. I accept the evidence that was given as to how the water which was brought into the houses was dealt with. The various owners formed an association, the Freeholders' Association it was called, and they made very rigid rules for their own guidance, and they provided men with properly constructed carts to go round every morning to collect the drainage. They collected all the drainage and got rid of it, not on the section, but some distance away. I am satisfied that the washing water and everything of that sort, was got rid of in that way and there was nothing which could in any way be material from the point of view of adding to the burden as the result of this tap which brought water for the use of people there.

On Mar. 28, 1934, the plaintiff company acquired their land. They had a club house and other buildings and that was apparently right in the

centre of the estate. All went well until the late summer of 1935, when the defendant board thought it was about time that they did something with regard to Bond's Sluice. For some thirteen or fourteen years at least, certainly from 1922, I gather that Bond's Sluice had been in dis-repair, that there had been no contrivance there of any sort for keeping out the sea, and that the sea-water had come into the dyke to the north of the counter-wall in considerable quantities. That being so, of course, no harm was done by anything that happened on odd occasions from the sluice at point "B." To repair this sluice at Bond's Sluice the defendants did what seems to me rather amazing. They blocked it up, with the usual result of blocking up a main river or anything which is ever by courtesy called a main river, that, of course, water in the dykes banked up and up, the level got higher and higher. Why a series of pipes was not put down to carry off the water temporarily from the main river I do not know. Mr. Johnstone, or Mr. Buckley, said it would have cost some little money. But, at any rate, whatever the reason, they blocked up that sluice, and it remained blocked up apparently for several months.

Then this happened. On Sunday, Sept. 15, there was a very high tide, a 10.7 feet tide, with a swell which brought the water over the road in quantities. Although the sluice was in operation, the water became about a foot deep near the ditch. No harm would have been done at all to anybody, no one would have thought of complaining, if Bond's Sluice had been in operation, as it had been for the past dozen years, but the water being banked up, of course, any additional water might become material. Mr. Hutley got nervous about this. His farm does not adjoin the Tendring Estate. Whyres Hall Farm is to the west, but to the north of Grasslands is Mr. Hutley's farm. The main river when it gets some way out of our maps to the north, apparently bends to the east, and this dyke into which the water went at the sluice at point "A", when it gets to the east, as shown on our plans, apparently turns north, and those two dykes meet at some point on Mr. Hutley's land just below a weir or dam he had, he being quite content to get fresh water for his cattle from above this weir. He found, owing to Bond's Sluice being blocked up, that the water was banking up to within a couple of inches of the top of the weir and he became nervous about it. He therefore complained to Mr. Buckley. Mr. Buckley himself, whether as the result of the complaint or not, I do not know, went and saw the water pouring through the sluice at point "B" into the dyke, but he did nothing until Tuesday, two days afterwards. It did not occur to him that there was any harm about this. Two days afterwards he screwed down the penstock and proceeded in that way to prevent the water going through. The result was inevitably that water ceased to escape. There it remained banked up on the south of the dyke until somebody came and reopened the penstock so that it escaped.

Nothing more happened, so far as I know, until Oct. 11. No further water had come in and I do not think that any more sea had come over. Mr. Hutley had, I gather, been asked to put his complaint into writing. On Oct. 11 he wrote this letter :

On account of a considerable quantity of sea water coming through the wall at the rear of the huts at Jaywick and the sluice not being in order to take it to the sea [that is Bond Sluice] it is flooding our marsh at Cockett Wick, and if it rises another two inches it will contaminate all our fresh water in the fleets newly cleaned out, which would be a serious thing for our stock.

Mr. Hutley said that there was only one occasion when the water came, and that, as I understood him, referred to what had happened in September. I do not know whether Mr. Buckley understood that or not or whether he read the letter as meaning that more water had come through. His instructions then were to block up the penstock with clay. Those instructions were given in a letter of Oct. 18. He therefore went and blocked it up with clay. It is possible that that was done because the penstock had been damaged.

The next thing was that somebody removed the clay at the beginning of November. I think it was again replaced by Mr. Buckley and was again removed.

In November a notice had been given that the Board were going to remove the sluice altogether. At that time, at Mr. Stedman's request, anything that might have been done was hung up while inquiries were made. On Dec. 11 a letter was written to Mr. Stedman stating that the board adhered to their decision to remove the sluice. On Dec. 13, within two days of that letter, the wall was cut down, the sluice was entirely removed, the hole blocked up and the wall replaced. It is in respect of that proceeding that this action is brought.

Unfortunately, this removal was followed by a period of very heavy rains, and by the end of December the Tendring Estate was so flooded that the water extended for three-quarters of the way up from the road. It came into all the houses on the lower side nearer to the ditch by some inches, including Mr. Symes' house and the club belonging to the other plaintiffs. All this water was due to rain. There is no record of any high tide at all ; the tides were quite moderate up to the beginning of January, and Mr. Johnstone and Mr. Hobbs, who were in a very good position to judge, said that it was only rain. There is no record anywhere of the sea coming over ; the tide chart does not show anything in the nature of a high tide from the middle of December to Jan. 2. The rainfall, however, was excessive. There were heavy falls recorded on Dec. 25, 26, 27, and 31—on the 31st there was a particularly heavy fall, and on Jan. 1 the accumulated effect of this rain was to flood the estate in the way described.

On Jan. 3, Mr. Hobbs took upon himself the responsibility of ordering the cutting of the wall. The wall was therefore cut and within two days the water had run away. It was all fresh water, using the word "fresh" in contradistinction to sea water. It was said by Mr. Johnstone and Mr. Buckley that they put their fingers in the water and tasted it, and it was salty. I have not the slightest doubt that, if rainwater was left standing for some days on that land, it would taste salty. As I understand over two-thirds of the surface consisted of the old salting surface and naturally one would not expect it to taste like tap water. It does not follow from its taste that any of it was sea water, and I am satisfied on the evidence that there was no sea water there.

The defendants restored the wall; they built it up again. Having restored the wall, there was flooding of the estate almost, though not quite, as bad as before. This was again almost entirely due to rain. I think there was one occasion on which it is said that a little sea water splashed over, but in substance it was rain water, and there was one date on which there was a heavy fall of rain during that time. There is no doubt that the evidence shows that it was in substance rain water.

On Dec. 21, Mr. Stedman appealed to the Ministry of Agriculture and naturally enough, he wrote to the clerk of the board for information. On Jan. 10, Mr. Bew wrote to the Minister to inform him about the position.

I am always loath to say anything reflecting upon anybody except in so far as is necessary for the case. Where a person is in the position of a clerk to a board to whom a department of the government looks for information and looks for true information, it must be a matter of the very gravest importance that the truth should be told, and not something which is as far removed from the truth as one can well imagine. Mr. Bew's letter was intended to suggest to the Minister that this sluice had been put there surreptitiously. As a result the Ministry would do nothing. Therefore the two plaintiffs in this case issued their writ on Jan 31, in order to have their rights determined.

In my view, the rights of the two plaintiffs were these. I think they had a right, or implied grant, to enjoy the benefit of the drainage of the surface water from their lands from this estate through the sluice at point "B," and that that right was one which availed against the owner of the servient tenement. I think that they still possessed the natural right. I find as a fact that the burden had not been increased. I think that it is very likely that, to some small extent, rain water reached the ditch which might otherwise have been absorbed. The roadways and the concrete all must have tended to reduce the area where there would be rapid absorption. These hard areas, I was rather surprised to hear, themselves absorb an amount of water, and of course, little pools collect and those little pools get evaporated. But it may very well be that, as a result of development of that kind, some little more surface water

reached the ditch. I am perfectly satisfied of this, that very much less sea water ever went on to this land or near the ditch than did before, and, looking at it as well as I can, I am satisfied that the burden was not increased and that the change, in so far as there was a change—and I think there was—it was the other way. I think the making of Brooklands Road materially reduced the burden which was imposed upon the servient tenement.

There is this further right which they had. The owner of the sea-wall and the sluice and the owner of the servient tenement were both permitting and desiring the old drainage system to continue in operation. As long as a person has, by lease or licence of the owner, a right to do a certain thing, that right continues against everybody except the owner giving the lease and licence. Certainly it is revocable at any time as far as he is concerned, but, as long as it has not been revoked, as long as the person granting the lease and licence continues to grant it and desires the other person to avail himself of it, that person has a right which is good and available against the rest of the world. Therefore I find as a fact, except so far as the position may be varied by the fact that we are here concerned with a sea wall, that there are rights which the law will recognise and will protect.

I find this further fact. I find as a fact that this sluice could not and did not at any time endanger the sea wall or tend so to do, and that no one ever thought that it would or could and that no one was actuated by such a fear.

Therefore, *prima facie*, the plaintiffs have legal rights. What is the answer? The proposition put in the forefront of the defendants' case is this: that no one can claim a right to maintain a breach in the sea-wall and that no one, not even the Crown, can permit a breach in the sea-wall or properly permit anybody to maintain it.

The authority for that proposition is *Attorney-General v. Tomline* (2). There the owner of some land adjoining the foreshore was removing the shingle from the foreshore, which belonged to him, and an owner of land adjoining this land complained that the removal of this shingle would tend to reduce a natural barrier against the sea, and that therefore the plaintiff had a right to the protection of that natural barrier, and that no one, not even the owner of the natural barrier, had a right to do anything which he, the plaintiff, could show might tend to injure his land. The plaintiff succeeded in obtaining an injunction to prevent the owner of the shingle from removing any shingle from the natural barrier so as to endanger the plaintiff's land and expose it to the inroads of the sea. The law was very clearly stated by JAMES, L.J., at pp. 61 and 62. I do not want to read it all; it is made clear that it is the duty of the Crown to protect the realm of England from the incursions of the sea by appropriate defences and that it is also the duty of the Crown to

leave unimpaired natural defences. It is also held that it is the duty of the Crown to protect banks, and banks being under the safeguard of the Royal authority, and any person removing a bank

which existed naturally so as to prevent or interfere with the performance by the Crown of this public duty, would be committing a wrongful act. It would be as much a wrongful act of a person wilfully to destroy the natural bank which the Crown was bound to protect and maintain, as it would be a wrongful act of any person to interfere with the artificial barrier which the Crown might out of its own revenues have set up by the erection of a sea wall. It would be a wrongful act to interfere with that which it would be the duty of the sovereign to maintain, a wrongful act which might result in a damage to a person who was entitled to the protection of the Crown and who was entitled to call upon the Crown to protect his lands from the inroads of the sea. It would be a wrongful act done in the nature of a nuisance, and the person who suffered the particular damage occasioned by the nuisance would have a right to call upon the court to interfere for his protection.

Later the learned Lord Justice says :

When the land was transmitted by grant to a subject the subject could not do that which would have been a wrongful act on the part of the Crown if the land had remained in possession of the Crown.

It is said that really means this : that neither the Crown, the owner, nor any authority can in any way interfere with the sea-wall, that no sluice can be made through it and that nothing in the nature of a breach, however small, is legal. In *Tomline's* case (2) the plaintiff had established injury. He had satisfied the court that if what was being done went on his land would be injured.

Here there is no evidence of that kind. If Mr. Dale, the owner of Whyres Hall Farm, had tried to make out a case of injury, I should imagine that he would have failed, and failed badly. He said :

I never made any complaint during all these years. My only complaint was when Bond Sluice was closed.

He said that, if Bond Sluice was working all right, he would not mind salt water at times running from point "A" down to Bond Sluice. I am satisfied that he would have had the very greatest difficulty in making out a case such as was made in *Tomline's* case (2). If Mr. Hutley, the only person who it is suggested might be affected, and who is not an adjoining owner (though I do not think that matters) had tried to complain, he would have been, I should have thought, in an impossible position. He cannot suggest and does not suggest that he can in any way be affected so long as the sluice is in operation, and he would be in the further difficulty that, years ago, he had consented to this sluice being put there. Be that as it may ; they are not parties to this case. I am not trying the question of whether they might have any possible claim.

In my opinion the principle which is supposed to have been laid down in *Tomlinson's* case (2) must be subject to some limitation. It must always be remembered—and it is always important to remember—that when you are extracting general principles from a case, what is being said is really being said with regard to the facts of the case. I think that principle was being laid down with reference to so-called breaches when they were such that adjoining landowners could make out a case of damage. If it is to be carried as far as the defendants carry it here, it would mean that there could be no sluice in the sea wall for any purpose, even for the purpose of protecting the wall. It would mean that there could be no sluice even for the purpose of permitting water to escape through the wall into the sea. The sluice at Bond Point was a breach of the sea-wall. Is that illegal? That is the outflow of the main river. There is a sluice at point “A” for the drainage of the Grassland. That is equally a breach of the sea wall. I cannot bring myself to think that it can be a sound proposition of law to say that a sluice, whatever its purpose, however necessary it may be, is necessarily illegal and something which even the Crown could not make.

As it happens, this question is not entirely without authority. It was dealt with in the case of *Board of Works for the Greenwich District v. Maudslay* (3). There the court had to consider how far private rights in connection with a sea-wall had to give way to public rights. The headnote is this :

There is nothing inconsistent with the purposes of a sea or river wall or embankment, erected to protect neighbouring lands, in a right of way along the surface ; and the same evidence of user will raise a presumption of a dedication of a right of way by the owner of the soil in the case of such an embankment as in any other case of uninterrupted and open user by the public.

The action was brought by certain plaintiffs against the defendants for obstructing a footpath which was alleged to be a common and ancient highway in the parish of Greenwich. This path ran along the top of a river wall or embankment formed and maintained for the purpose of keeping out the water of the River Thames from the marshlands enclosed and protected by the board. One of the facts stated in the case was this, at p. 398 :

The servants and agents of the commissioners of sewers, and subsequently of the plaintiffs, have constantly repaired the wall, piercing it with drains, constructing sluices in it when necessary for the purpose of draining the marshes, and have used the path and worked on the wall in the course of executing the necessary works.

If the defendants are right in this case, every one of those acts was illegal and anybody could go along and cause this sluice to be blocked up. What COCKBURN, C.J., said was this, at p. 401 :

The legal proposition contended for by Mr. Raymond on behalf of the defendants is, that as this footpath passed over the top of the sea wall which was erected to protect the land against the river, no right can have been acquired by the public, because the wall is under the control of the commissioners of sewers, and erected for public purposes. Now we have heard no authority cited for that proposition, which appears to me to be a great deal too large. The power to erect a sea-wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of those things which emanate from the prerogative of the Crown for the general safety of the public; and no doubt the ordinary rights of property must give way to that which is done under that great prerogative authority for the protection and safety of the public, but only to the extent to which it is necessary that private rights or public rights should be sacrificed for the larger public purposes, the general common weal of the public at large. And so far as the rights of property, or the rights acquired over property, as in the case of a public right of way acquired by the public, can be exercised consistently with the larger public purpose for which the power of the Crown is exercised, the rights of property need not be interfered with, or the rights incident to it.

BLACKBURN, J., put it in just the same way.

Therefore, if that authority is right (and of course I am bound by it) the proposition contended for by the defendants goes altogether too far. I take the law to be just what I think one's common sense would lead one to suppose it would be, that the only limitations upon the rights of a private owner, or the private rights of anybody who happens to possess them, are not interfered with because the land in question in respect of the right which is claimed, is a sea-wall, except in so far as it is necessary to preserve those interests which the sea-wall was designed to protect.

I am perfectly satisfied, with regard to this sluice, constructed as it was in the winter of last year, that I should have come to the same conclusion if there had been no penstock there; but with the penstock there I have no hesitation in saying that the existence of that sluice in no way prejudiced anybody; in no way prejudiced the purpose for which the wall was there. It led to no inundation and to no injury to the land beyond, and it is wholly impossible to say that its existence was the existence of something which infringed the law—was something which, as indeed it was said to be, a crime in itself; and I find it impossible to hold that the plaintiffs could have no right which a court of justice could recognise. It must be remembered that Tendring was just as much part of the realm as the land behind it. It had the same right to be protected. For some reason, the duty of protecting it had not been performed but the Crown must say (if it was the Crown who constructed The wall): "I must hold the scales fairly here. I can build a sea-wall to protect the land to the north but that will be against the interests of the land to the south. It will cause natural surface water to bank up instead of flowing away off the lower land. It will cause the sea, when it comes, to remain instead of spreading, as it naturally would.

I could only protect the Grassland if I permit the surface water to flow through the sluice at this point, and when I construct this wall I am going to construct this culvert to give due protection to the land on the other side which is not protected by the sea-wall." Whether the Crown said it then, or whether it was said later, does not seem to me to matter. One is bound to presume that everything has a legal origin and I am not going to infer here that the culvert had been put there without the consent of the Crown or whoever represented the Crown for the purpose of these matters.

It is perfectly true that no landowner could complain unless he could make out a case of danger to his property. Even if he could the question is: Could a stranger? I think it is plain that a stranger could have no right to interfere with this. No stranger could prove damage. No stranger could come to a court and ask the court to interfere. Can it be said that a stranger, who could get no relief, could himself go and do that which a court would not do for him? It is said that any stranger could do what the defendants did here and that it is unnecessary for them to seek to justify what they did by calling in aid the powers conferred upon them by the Act of 1930. It seems to me that it is really suggested that I, or anybody else, can go trespassing on Mr. Stedman's land and cut a gap in his sea wall, take away his sluice, fill up the hole and flood an estate containing about a quarter of a million pounds' worth of property, when of course a court would not listen to anybody for a moment if he went there to get that done. It is, I was going to say, an absurdity.

If that is right, it means that the defendants have to justify what they did by the powers conferred upon them under the Act. When one looks at the Act, one naturally looks at sect. 1, which says:

For the purpose of the drainage of land there shall be such drainage districts as are mentioned in this section, and there shall be a drainage board for each such drainage district.

Subsect. (3) says:

Subject to the provisions of this Act, a drainage board shall exercise a general supervision over all matters relating to the drainage of land.

This Act shows that powers connected with the main rivers are vested in the defendants. I must refer to sect. 7 (1), which says:

A catchment board shall exercise a general supervision with respect to the drainage of the catchment area, and may for the purpose of securing the efficient working and maintenance of existing drainage works within the catchment area and the construction of such new drainage works as may be necessary, give such general or special directions as they consider reasonable for the guidance of the internal drainage boards.

Sect. 34 is the section which is mainly relied upon. There the powers are under headings. The first is under (a) and is

to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work : (b) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse, or remove mill dams, weirs or other obstructions to watercourses, or raise, widen, or otherwise improve any existing drainage work : (c) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district.

Subsect. (4) is important. That says :

It is hereby declared that nothing in this section authorises any person to enter on the land of any person except for the purpose of maintaining existing works.

Subsect. (3) says :

Where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under this section, the board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts.

Here the defendant board trespassed upon Mr. Stedman's land. They went on to his land, they cut the sea-wall, which was his, and they took away his sluice. There is no question, I imagine, that that would be trespass. But Mr. Stedman is not the plaintiff here.

It was said, and was strenuously argued, that what was done came within 34 (1) (a), that what was done was done to maintain in a due state of efficiency an existing drainage work. A sea-wall is a drainage work. That appears from the definition. It is said that all they were doing was to maintain an existing drainage work. I do not agree with that for one moment. Just as the sea-wall was a drainage work, so was the sluice. That is plain. "Drainage works" include a large number of things. "Watercourses" includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers and so on. Therefore, this sluice was certainly an existing watercourse, and I should imagine it was also a drainage work, because it was something which was also draining land ; at any rate it was an existing watercourse. Therefore, anything which was done necessarily for maintaining it in a state of efficiency would have been legitimate. I should have imagined it would have been perfectly legitimate to repair the penstock, if the penstock was out of order ; but if one is going to regard the thing as a whole, the description would surely be that it is a sea-wall with a sluice underneath it. The sluice was not through the sea-wall ; it was through solid ground under the sea-wall, between the two ditches. I do not know whether that can be regarded as something which is technical or not. It may be that "sea-wall" includes the land on which it rests.

This work is really a wall which is a sea-wall with a sluice under or through it. This was an existing drainage work and it was not maintained. It was altered into a sea-wall without a sluice under it or through it. It was done not with any view of preserving the safety or strength of the sea-wall itself. It was done—there is no question whatever about it—merely to prevent brackish water getting into certain dykes at a time when the natural escape of the water was blocked up at Bond's Point. Therefore, I am quite satisfied that what was done cannot be justified under sub-sect. (1) (a). It was not a work of maintenance; it was a work of destruction. It made a complete change in the situation and, in my opinion, it cannot be covered by the word "maintain."

If what was done comes under sub-clauses (b) or (c), it is something which can only be done subject to paying compensation to persons whose rights are affected. The reference to Land Clauses Acts carries with it, I think, this: not that you can go about the work as and when you please, but that you must do that which you want in accordance with the provisions of the Land Clauses Acts so far as they apply. Under those Acts you have to give notice of what you intend to do, and to have compensation fixed. If there is a dispute as to whether what you are doing comes within your powers, there are ways and means of determining that question. If the question of compensation arises, the amount is fixed, and it is only when that is completed that you have the right to do the work. When the compensation has been fixed, you have a compulsory right to do that which you wish. Nothing of that sort occurred here, and the right to compensation has, in fact, been strenuously denied from first to last.

Therefore, in my judgment, that which has been done cannot be justified under any section of this Act. The more one reads the Act the more one finds, again and again, provisions for the protection of people who would be affected. At every stage they have rights of calling into question decisions of many kinds arrived at by catchment boards, and I am certain that it would be inconsistent with the whole spirit of the Act to suppose that anything like this could be done in the way it was done. It may be that the defendants will have to pray sect. 45 for the doing of what they wish to do. There they have compulsory powers of purchase and those powers extend to the purchase of any work or easement which interferes with the proper drainage of their district. Here there is an easement which *prima facie* exists. If they wish to put an end to that, it may very well be that when the question arises their only way of doing it will be to purchase that easement, may be, to purchase the land through which the watercourse flows. I am coming to no decision about that; I am merely saying that it may very well be that purchase will be necessary to enable the defendants to do that which they wish to do.

Another question arises which I must decide. It is said by the plaintiffs that, even if the defendants had a right to do this, even if there were some words in the statute to authorise that which they did, they acted *ultra vires* because they acted unconsciously, harshly and unreasonably and were not within their powers.

The case of *Howard-Flanders v. Maldon Corporation* (4) was cited. There is no doubt that the principle enunciated was very clearly laid down. The passage which best summarises the law is about the middle of the judgment of SCRUTTON, L.J., at p. 99, quoting with approval COLLINS, L.J., in *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works* (5), at pp. 611, 612. The learned Lord Justice says :

It is merely an assertion of the proposition so frequently affirmed that, where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers. . . . But it must be admitted that the defendants are bound to exercise their statutory powers with reasonable regard for the rights of other persons.

I do not see how there can be any two views about the facts of this case. I hold without any hesitation that the defendants acted unreasonably, harshly and unnecessarily and without any regard whatever to the rights of a very large number of people. They may be poor people ; I do not know ; but they own these small houses to which they come for their summer holidays. There was property on this estate which was worth a quarter of a million pounds, and the board showed no consideration for their rights. Even if the people had no rights, the board showed no consideration whatever for their interests. Even when they knew that after that first time when they shut the sluice the result had been to bring water into a great number of these houses, and when the chairman of the association had been driven, in order to save the situation, to cut through the wall, they closed the gap up again without doing anything to seek to avoid the injuries which the act which they had done in September was going to cause these people.

I want to refer to some evidence of Mr. Buckley, which certainly he would not have given if he had not realised that it was the truth. He said :

If the penstock was regulated carefully, the system might work satisfactorily. It might not keep Brooklands clear if the flooding was very bad. If the penstock worked properly, there could be no objection to the old system, because salt water in the ditch from "A" to Bond Sluice would not matter. If it did not work properly, it might get salt water banking up in the dykes ; but, if someone was willing to make the system work satisfactorily, it might not prevent Brooklands from being flooded at times.

In other words, quite clearly, from the point of view of safety and the

protection of the sea-wall, what they did was wholly unnecessary. There was not the slightest idea or fear of inundation anywhere. The whole point was whether a little sea water could get into this dyke from point "A" to Bond Sluice. Mr. Buckley said that really would not matter at all, if the existing work would work; nobody would have complained at all. Instead of giving some warning or taking some steps to arrange that the penstock should be worked if occasion required it—it has not required it for the four or five years that it had been there—and seeing that some reasonable result was arrived at, the defendants acted in the harshest way, and I attach considerable importance to this. Here is something which has been in existence for years and years with their consent. If they had wished to make a change, the reasonable thing was to give the other people fair notice that they were going to make that change, so that they could adopt some alternative way of dealing with the situation. When they say on Dec. 11: "We are going to remove this" and to remove it in two days, knowing the inevitable result, to suggest that that is reasonable is going too far. I should have thought that the conduct of the defendants was altogether wrong. It is no answer to say "We gave notice in November." The operation of that notice was held up so that Mr. Bew could learn the truth. Mr. Bew learned the truth. He and the board on Dec. 11 came to their final decision, which was put into operation within a couple of days. Mr. Stedman was not telling the plaintiffs anything about it. There is no suggestion that a single one of these householders were told anything about what was going to happen. Mr. Stedman was told and no attempt was made to do anything. These people might not have existed for all the defendant board did. They showed no consideration for their rights. Even if they had a legal right to do that which they did, I think it was exercised in a harsh and unreasonable way, and I think that what they did was not conferred upon them by any statutory provisions.

In my opinion, the result is that the plaintiffs are entitled to all the declarations asked for, including the amended one and a mandatory order with costs.

Solicitors: *Leonard Tubbs & Co.* (for the plaintiffs); *Tamplin, Joseph, Ponsonby, Ryde & Flux*, agents for *W. Hilliard & Ward*, Chelmsford (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

WORLD TRANSPORT COMPANY v. TEALING AND COMPANY

[KING'S BENCH DIVISION (Hilbery, J.), **May 5, 1936.**]*Carriers—Remedies—Delivery to market salesman—Liability to pay carriage out of proceeds of sale.*

A foreign consignor sent fruit consigned to himself in England, instructing a firm of carriers to collect goods and pay charges. The consignor's son ordered them to deliver the goods to a firm of market salesmen. This firm accepted the goods, sold them, and credited the son with the proceeds, and refused payment to the carriers :—

HELD : (i) a market salesman who receives the goods of another to sell, is as against the carriers an independent contractor and is the consignee, although he may be liable to a principal to "sell and account."

(ii) his acceptance, in the absence of notice to the contrary, is evidence of an implied contract with the carrier to pay his charges, of which the consideration is that the carrier has parted with his lien.

[EDITORIAL NOTE. The consignor is generally the person who is liable to the carrier and the consignee is only liable when it can be shown that he is an agent of the consignor. The particular circumstances of delivery to market salesmen, though not held to be the subject of an established custom, are the subject of a well-recognised practice that transport companies look to them for their charges. The decision here that in the absence of notice to the contrary there is a contract between the salesmen and the transport company, based upon the consideration that the latter have given up their lien on the goods.

AS TO REMEDIES OF CARRIERS, see HALSBURY, Hailsham Edn., Vol. 4, p. 89, No. 127; and FOR CASES, see DIGEST, Vol. 8, pp. 217, 218, Nos. 1378-1382.]

Case referred to :

(1) *Great Western Ry. Co. v. Bagge* (1885), 15 Q.B.D. 625; 8 Digest 217, 1379.

ACTION by the plaintiff company for £223, charges for delivery of goods to the defendant company.

B. Cabarro, a foreigner, sent perishable goods from Spain to England consigned to B. Cabarro, London. World Transport Co., the plaintiffs, a firm of carriers, were instructed by B. Cabarro to collect the goods at London, and told that in order to do so, it would be necessary to pay charges (customs, freight, etc.) and obtain possession. On the instructions of the son of B. Cabarro, J. Cabarro, who was in London, World Transport Co. delivered the goods to Tealing & Co., salesmen, and sent the invoice to Tealing & Co., the defendants. Tealing & Co. accepted the goods, immediately sold them, and paid the proceeds into the account of J. Cabarro, to whom they had previously made advances. They then refused to pay the plaintiffs, who claimed against Tealing & Co. (a) as consignees, (b) on an implied contract, the consideration being the surrender by World Transport Co. of their lien. By their defence Tealing & Co. alleged that they were agents for J. Cabarro.

P. Quass, for the plaintiffs: In the case of a foreign principal, the agent is liable; in the case of an undisclosed principal in England the agent is liable. At all events, in relation to the World Transport Co.

defendants are principals and consignees. There was no notice to the contrary. There is an implied contract and defendants are estopped.

B. H. Waddy, for the defendants: A carrier's contract is with the consignor: *G.W.R. v. Bagge* (1). Tealing & Co. were only servants of the consignor. There was no conduct amounting to evidence of an implied agreement, and no estoppel. At all events there is a difference between the first consignment and later consignments. If notice should have been given in the later cases, notice clearly could not have been given at first delivery, because no invoice had yet been received. The evidence of the subsequent consignment is irrelevant to the first consignment and there is no subsequent conduct here effective to move the prior request.

Quass, in reply: Tealing & Co. may be agents of B. Cabarro of J. Cabarro to "sell and account," but not for any other purpose.

HILBERY, J.: In this case the plaintiff firm, World Transport Co., is claiming £223 from the firm of Tealing & Co., the defendants, this sum being the charges of World Transport Co. for the delivery to Tealing & Co. of crates of fruit sent to London from Spain by the firm of Basilio Cabarro. These crates were collected in London by the World Transport Co., who had paid certain expenses incurred abroad, such as customs and freights. The crates were delivered by World Transport Co. to Tealing & Co., fruit salesmen in the Borough Market, and there sold by them. I have in front of me a form with printed headings, showing what was sent and by whom it was sent. By this form it appears that crates of fruit—one was a parcel of apricots—were despatched by Basilio Cabarro to London, and the sheet shows Basilio Cabarro as the name of the consignee, but the only persons given authority to collect in London are the plaintiff firm. The sheet shows the amount of charges in respect of the goods coming forward, the charges of persons abroad, freight, etc., which have to be paid so as to enable the plaintiffs to obtain possession of the goods. When the goods arrived the plaintiffs were told by telephone that these goods, which only the plaintiffs were entitled to collect, should be delivered to Tealing & Co. Armed with documents and instructions, the plaintiffs received the goods at the railway. The goods were perishable and had to be collected at once. This was early in the morning. At such a time it is hard to ascertain to which salesman each crate is to be sent, and what charges are to be made to each. Therefore the delivery note with printed headings contains under the heading charges the words: "to follow." "To follow" is written in. The delivery note is made out to Tealing & Co., Borough Market, to whom the goods are delivered and by whom they are sold later in the day. Charges having been subsequently worked out, an invoice is sent to Tealing & Co., showing what charges World Transport Co. are expecting Tealing & Co. to pay.

On these facts I have two observations to make. First, it is admitted that it is the usual (not universal) practice for transport companies to deliver to salesmen and to collect from salesmen their charges; the salesmen deduct these from the proceeds of the goods and render account of them to their principals, if principals you choose to call them. Secondly, it is not disputed that the World Transport Co. were collecting in this way, and that World Transport Co., having payments to make, had a lien on the goods. Having delivered, the plaintiffs sent charges to the defendants. The plaintiffs had no notice that anything but the usual procedure prevailed. They acted in the usual way, and as the account was sent in in the usual way, they were content to lose their lien. Not only was this so in relation to the first consignment, but the defendants did not notify the plaintiffs of anything unusual or of any relations between themselves and J. Cabarro. The first consignment was sold; the second and more important was dealt with in the same way. The defendants, having had details of the first account, received the second consignment. They knew they were being looked to for the charges; they received details the same day and made no comment. Even then they did not notify the plaintiffs, who were waiving their lien and delivering, that they should not look to the defendants for payment. The third and fourth consignments were dealt with in precisely the same way. The defendants quite understood the situation, that the plaintiffs were looking to them for payment. This is quite clear from the evidence. The manager of the defendant firm said that the clerk pointed out to him that the goods were being delivered on instructions of J. Cabarro and that J. Cabarro was not paying the charges. After his attention was called to it, he let the World Transport Co. go on delivering.

There is an explanation which is simple and palpably correct. In previous years, in many transactions, advances had been made by Tealing & Co. to J. Cabarro, and at the end of the account J. Cabarro had had more in advances than the sales produced and was in debt to Tealing & Co. Therefore, when part of the consignment came forward Tealing & Co. were glad to sell it and recoup themselves, in some part, for J. Cabarro's debt to them. If they had notified World Transport Co. that they were not paying but that J. Cabarro was to be liable, then World Transport Co. would not have made the second delivery. It is clear that Tealing & Co. knew what was happening. They had no reason to suppose that J. Cabarro had paid. Being advised of the plaintiffs' disbursements, they accepted the first consignment, and being advised of the plaintiffs' charges they took the second and third and fourth deliveries. In these circumstances what is implied is this. If written large, the words would be "We, World Trading Co., have expended moneys on these goods, therefore we have a lien on them, and in the usual way we deliver to you and, having waived our lien, look to

you for payment." Tealing & Co. assented to this. They clearly accepted the fact that the plaintiffs had paid and were waiving their lien.

It is said that in this transaction Tealing & Co. were agents for a disclosed principal. On the facts it is not so. In truth Tealing & Co. were independent contractors. They may have been agents to sell and account, but not to do more than that. In the circumstances, the plaintiffs are entitled to succeed in their claim to the full amount.

Solicitors: *Ernest G. Scott & Co.* (for the plaintiffs); *W. R. Millar & Sons* (for the defendants).

[Reported by GERALD ABRAHAMS, Esq., *Barrister-at-Law.*]

ROWELL v. PRATT.

[COURT OF APPEAL (Greer, Slessor and Greene, L.J.J.), April 21, 22, May 15, 1936.]

Evidence—Privileged document—Farmer's return to Potato Marketing Board—Agricultural Marketing Act, 1931 (c. 42), s. 17.

A merchant supplied a farmer with royal kidney seed potatoes sufficient for 9½ acres, and by agreement the merchant was entitled at an agreed price to all the potatoes grown from their seed upon those acres. In an action by the farmer to recover from the merchant the price payable in respect of certain potatoes delivered, the merchant counterclaimed damages alleging that the farmer in breach of his contract had delivered to other buyers some of the royal kidney potatoes grown on the 9½ acres above mentioned. Before trial the merchant, hoping to support his contention that the farmer had planted only 9½ acres with royal kidney potatoes, *subpœnaed* the secretary of the Potato Marketing Board to produce the return made by the farmer giving details of, *inter alia*, all royal kidney potatoes planted by him. The county court judge held that the return was a privileged document which need not be produced and upon the other evidence he gave judgment for the farmer. The merchant appealed:—

HELD [GREER, L.J. dissenting]: in the absence of clear unambiguous language in the Agricultural Marketing Act, 1931, there was nothing in sect. 17 of that Act which took away from a party to legal proceedings his common law right to obtain for the information of the court all material evidence. The appeal should be allowed and a new trial ordered.

[EDITORIAL NOTE. This case raises for the first time the question whether a return made to the Potato Marketing Board is (a) a state document the production of which is contrary to public policy; (b) a document the production of which is prevented by the Agricultural Marketing Act, 1931, s. 17 (2). The first point was not taken by the Board and is only incidentally referred to in the judgments. It seems to have been accepted that the Potato Marketing Board is not a government department for the purposes of this rule. The real issue was whether the representative of the Board could refuse to produce the document under sect. 17 (2) of the Act, and it was decided by a majority that he could not.

AS TO PRIVILEGE FROM PRODUCTION, see HALSBURY, *Hailsham Edn.*, Vol. 13,

pp. 727, 728, para. 801; and FOR THE CASES, see DIGEST, Vol. 22, pp. 392-395, Nos. 4013-4033. FOR A CASE OF A DOCUMENT PROHIBITED BY STATUTE FROM PRODUCTION, see DIGEST, Vol. 22, p. 161, No. 452. FOR THE AGRICULTURAL MARKETING ACT, 1931, s. 17, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 24, p. 29.]

Cases referred to :

- (1) *Amey v. Long* (1808), 9 East, 473; 22 Digest 427, 4409.
- (2) *Miles v. Dawson* (1795), 1 Esp. 405; 22 Digest 432, 4481.
- (3) *Bateson v. Hartsink* (1801), 4 Esp. 43.
- (4) *Beatson v. Skene* (1860), 5 H. & N. 838; 22 Digest 392, 4013.
- (5) *Ankin v. London & North Eastern Ry. Co.*, [1930] 1 K.B. 527; Digest Supp.
- (6) *Chester v. Bateson*, [1920] 1 K.B. 829; Digest Supp.
- (7) *Arthur v. Bokenham* (1708), 11 Mod. Rep. 148; 33 Digest 147, 257.
- (8) *Lee v. Birrell* (1813), 3 Camp. 337; 22 Digest 395, 4030.
- (9) *Re Hargreaves (Joseph), Ltd.*, [1900] 1 Ch. 347; 22 Digest 393, 4014.
- (10) *Robinson v. South Australia State* (No. 2), [1931] A.C. 704; Digest Supp.

APPEAL from a decision of His Honour JUDGE FARRANT given at Wisbech County Court on Nov. 19, 1935. The facts are fully set out in the judgments.

D. N. Pritt, K.C., and *S. L. Elborne*, for the appellant.

R. P. Croom-Johnson, K.C., *Gerald Gardiner* and *A. M. Wallace*, for the respondent.

GREER, L.J. : The respondent, a farmer in a part of Lincolnshire where potatoes are largely grown, claimed against the appellant money due for potatoes delivered by him pursuant to an agreement made with the appellant. There was no defence to the respondent's claim, but the appellant, who is a merchant dealing in potatoes, put in a counterclaim alleging that the respondent had in breach of his contract delivered to other buyers some of the potatoes which under his agreement he was under obligation to deliver to the appellant, and claiming damages in respect of such wrongful deliveries. For convenience I will refer to the respondent as "the farmer," and to the appellant as "the merchant."

The prevailing custom in the district in which the two parties carried on their business was for merchants to supply seed potatoes sufficient for an agreed acreage, and when they did so they were entitled to all the potatoes grown from their seed upon the agreed acres. In this case the merchant and the farmer agreed that the merchant should supply to the farmer sufficient seed to be planted in $9\frac{1}{2}$ acres in two parts of a field marked "C" on the plan which was used at the trial. The merchant in order to sustain his counterclaim had to establish that some of the potatoes grown on the $9\frac{1}{2}$ acres had been delivered otherwise than to himself. He was able to show that potatoes of the agreed kind, that is to say, "royal kidney" potatoes, had been so delivered, but the farmer alleged and called a considerable quantity of evidence to prove that he had planted royal kidney potatoes in another 4 acres, and this accounted

for any deliveries he had made of royal kidney potatoes otherwise than from those to which the merchant was entitled. If this was true, the counterclaim necessarily failed.

Under the scheme made under the Agricultural Marketing Acts, 1931-33, regulating the marketing of potatoes, the Marketing Board had the right to require from producers such estimates, returns and other information relating to potatoes as the Marketing Board might specify; see reg. 76 of the scheme; and by reg. 79 any producer failing to comply with any demand or requirement made by the board, or making a false statement, would become liable to such penalty as might be imposed by the board not exceeding £20.

The Agricultural Marketing Act, 1931, s. 17, provided as follows:

(1) No information with respect to any particular undertaking (other than the undertaking of a board) shall, without the consent of the owner of that undertaking, be included in any report laid before Parliament in pursuance of this Act or in any recommendations of an agricultural marketing reorganisation commission published in pursuance of this Act. (2) Any person who discloses any information obtained by him in the exercise of any power conferred on him by or under the provisions of this Act relating to polls, or in the exercise of any power conferred by or under this Act on any board, consumers' committee, committee of investigation, or agricultural marketing reorganisation commission, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine not exceeding £100 or to both such imprisonment and fine, or on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £50 or to both such imprisonment and fine: Provided that nothing in this section shall apply to the disclosure of any information in so far as it is required to be disclosed for the purposes of legal proceedings (including arbitrations) under this Act or any scheme made thereunder, or for the purpose of any report of such proceedings, or in so far as the disclosure is required or authorised by this Act, or any scheme made thereunder.

We were provided with a form showing the information which the marketing board required from producers of potatoes. In this form all producers of potatoes were required to state, *inter alia*, the number of acres of royal kidney potatoes planted by them. The farmer made a return in the prescribed form, but kept no copy of it. If the return showed that only $9\frac{1}{2}$ acres of royal kidney potatoes had been planted by the farmer, such a document would be evidence against him that he had no royal kidney potatoes except those which were planted in the $9\frac{1}{2}$ acres, and accordingly if it was proved to the satisfaction of the court that he delivered potatoes to dealers other than the merchant, that could only be explained either by saying that his return was a false one, or by holding that his deliveries to other people came from the $9\frac{1}{2}$ acres to the produce of which the merchant was entitled. It was accordingly of importance to the merchant to obtain, if possible, the production at the trial of the return made by the farmer to the marketing board. Before the case came on for hearing in the Wisbech County

Court, the merchant, in the hope that he might thereby support his counterclaim, served a *subpœna duces tecum* on the secretary of the marketing board to produce the form. The secretary, apparently with the authority of the board, brought the return into the precincts of the court, but did not produce it. The marketing board sent their solicitor to appear and contend that the secretary was not bound to produce the document. Counsel for the merchant asked the judge to make an order for the production of the return, and the question involved in the appeal is whether the judge was wrong in law in refusing to make the order.

The *subpœna duces tecum* had been obtained by the merchant's agents for the purpose of procuring the production of the document to his counsel and solicitor at the hearing. If an order was made for the production of the document and it was accordingly produced, this would not have made it evidence in the case. The merchant's counsel would have been entitled to look at it and decide whether he would or would not put it in evidence. Just as in the case of a *subpœna ad testificandum* the party obtaining and serving the *subpœna* would not be bound to put the witness in the box. In my opinion, in a proper case the judge at the trial would have power to order the production of a document in respect of which there had been a *subpœna duces tecum*; see *Amey v. Long* (1). It was there held that the writ of *subpœna duces tecum* is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the court, and not the witness, is to judge. In the case of *Miles v. Dawson* (2), an action for trespass for taking the plaintiff's ship, LORD KENYON refused to make an order for production of a power of attorney from the defendant to the person who had taken possession though the latter had been served with a *subpœna duces tecum* in respect of the power of attorney. In *Bateson v. Hartsink* (3), the solicitor to the assignees of a bankrupt was held by LORD KENYON not to be bound to produce the bankruptcy proceedings. The learned Lord Chief Justice said that the solicitor was not bound to produce the proceedings because it would be criminal for him to do so, as they were not his papers but those of his clients, the assignees of the bankrupt's estate. Accordingly it has frequently been held that if a witness who had been *subpœnaed* to produce documents of which he has on behalf of an employer or principal the physical possession or custody, he cannot be ordered to produce them if he is forbidden to do so by his employer or principal. See the cases to this effect which are cited in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 13, p. 738. I need not refer further to the cases; I have read all and the rule is well accepted.

It seems to me clear from the stand taken at the hearing in the county

court by the solicitor for the board that the board were withholding their consent to the production of the document by their secretary. Further, the county court judge was, I think, right in treating the Agricultural Marketing Act, 1931, s. 17, as a statutory prohibition of the disclosure of the information contained in the farmer's return to the board. There could not be a more effective way of prohibiting the disclosure than by enacting that such disclosure should render the person making it liable on conviction on indictment to imprisonment. It may be true that if the judge had made the order the secretary would have had a good defence to an indictment under sect. 17, but in my judgment it would have been wrong for the judge to make an order involving the disclosure of information when it would have been criminal on the part of the person guilty of such disclosure if it were made without an order of the court.

The view that I take of sect. 17 (2) is that the first part of the section impliedly prohibits the disclosure of any information received by the board to either of the parties to any litigation. This view explains why it was considered necessary by the legislature to say in the latter part of sect. 17 (2) that the section should not be read as a prohibition of the disclosure of such information for the purposes of legal proceedings under the Act. This part of the subsection was necessary in order to answer any contention that subsect. (2), if there had been no proviso, would have prohibited the use of such information in proceedings under the Act. If and in so far as sect. 17 was intended to protect amongst other people the producers who were obliged by the scheme to give information to the board from having the information so given disclosed to their rivals in trade or any other person who might use it for the purposes of legal proceedings against them, the proviso in the second part of subsect. (2) was necessary to make it quite clear that the prohibition contained in the first part of the subsection was not to be applied to legal proceedings under the Act or any scheme made thereunder. The protection afforded to producers giving information to the board by filling in the form would not have been very useful if it could always be rendered nugatory by any person who wanted disclosure bringing an action against the producer for an alleged breach of contract or for tort and serving the secretary of the board with a *subpœna duces tecum* to produce the document containing the information. Further, a disclosure in court would do the producer much more harm than a disclosure out of court. The production in a public court of the document would have been disclosure not merely to one of the litigating parties but to everybody present in court, and, through the newspapers, probably to all the producer's competitors in the potato trade.

For these reasons I am of opinion that the refusal of the learned county court judge to make an order for the disclosure of the document

was not a mistake in law or a misdirection of himself which would justify this court in ordering a new trial.

Further, it was contended in the appeal on behalf of the farmer that there had been no miscarriage of justice because even if the return had shown that the farmer had only returned $9\frac{1}{2}$ acres as planted with royal kidney potatoes, the independent evidence of seven witnesses would clearly have established that he had planted the additional 4 acres with regard to which the merchant was not concerned, and that the only reasonable conclusion which, having regard to this overwhelming evidence the judge could have come to if the return only showed $9\frac{1}{2}$ acres would have been that for some reason or other the farmer had misstated in his return the acreage planted with royal kidney potatoes. I think this argument is well founded. In my judgment this appeal should be dismissed with costs on the ground above stated, but inasmuch as my brethren think otherwise, the order will be as they decide.

SLESSER, L.J. : In this case, which raises a question of some constitutional importance, the plaintiff claimed the sum of £98 for potatoes sold and delivered by him to the defendant. The defendant, in substance, admitted the claim, but raised by counterclaim the complaint against the plaintiff that he had agreed by two contracts in writing, dated Jan. 6, 1934, and Mar. 31, 1934, to grow for the defendant $9\frac{1}{2}$ acres of potatoes and deliver the whole of the proceeds of the land to the defendant at £2 10s. per ton, but that, in breach of his contractual obligations, the plaintiff had not delivered to the defendant the whole product of the $9\frac{1}{2}$ acres, but had wrongfully sold some 44 tons of potatoes to a company known as Pattullo Higgs & Co. at a higher price than that at which he had contracted to sell to the defendant.

In these circumstances, as the learned county court judge says, the main issue in the case was whether or not the plaintiff had planted royal kidney potatoes in a certain field on the plaintiff's farm in addition to those planted on the $9\frac{1}{2}$ acres referred to in the contract. If he did, it was taken that such planting would sufficiently account for the potatoes sold to Messrs. Pattullo Higgs; in which case, such potatoes being grown outside the contractual area it would be strong evidence that the plaintiff had not broken his contract notwithstanding that he admitted that he had sold a substantial amount of potatoes to Messrs. Pattullo Higgs.

The learned county court judge came to the conclusion that these potatoes were grown in a field of the plaintiff not included in the contract with the defendant and gave judgment for him on the claim and counterclaim.

The appeal in this case is based upon the complaint that, in considering where the plaintiff in fact planted these potatoes, the learned county court judge wrongfully rejected material evidence which the defendant

wished to place before him. That evidence was contained in a return by the plaintiff made to a body known as the Potato Marketing Board set up under the Agricultural Marketing Act, 1931, which, it was said, would show whether the plaintiff had made a return with regard to the total acreage of potatoes planted in his various fields.

The return sought to be adduced asked among other questions the following very relevant one: "What is the total acreage of potatoes planted this year on all the land in your occupation in Great Britain?" It is clear that the answer might be very material to a determination of a principal issue in the case, for, if the answer were $9\frac{1}{2}$ acres, it would go greatly to assist the defendant's contention that the potatoes sold to Messrs. Pattullo Higgs were raised on land which was the subject of the contract between him and the plaintiff, whereas if the return were a larger acreage, it might well go to support the plaintiff's story. In either case, in my view, it is not possible to say that the answer would not be an important one for the judge to consider, nor can I think that, if he has wrongly rejected the evidence, that such rejection would not cause a substantial wrong or miscarriage of justice within the meaning of R.S.C., Ord. 39, r. 6.

In asking the learned county court judge to refuse to look at the return, it was not suggested, nor is it suggested here, that any privilege attaches to the Potato Marketing Board by reason of its being a government department. A communication to a government department is protected from production, as being a state secret if the Minister or head of the department sees fit to claim such protection for it. The Minister to whose department a document belongs or the head of the department in whose custody it is, is the exclusive judge whether or not that document is protected from production on grounds of state policy, and if he claims such protection the court will not go behind the claims if the objection that the document is protected from production as being a state document is taken by the proper officer of the government himself, the Minister or head of the department: see *Beatson v. Skene* (4). In that case, POLLOCK, C.B., at p. 853, speaks of the production of a state paper being injurious to the public interest. The latest case in this court on the point is that of *Ankin v. London & North Eastern Railway Co.* (5), in which case it was held that a copy of a report of an accident supplied to the Minister of Transport under a statute was privileged on a statement of the Minister that a production of the document would be contrary to the public interest.

In the present case, it is not possible to say either that the Potato Marketing Board is a government department or that a return made to them under the Agricultural Marketing Act, 1931, is a state paper in the language of POLLOCK, C.B. The Potato Marketing Board is constituted under the Agricultural Marketing Act, 1931, s. 2, under a

scheme submitted to the Minister for regulating the marketing of an agricultural product by the producers thereof (sect. 1 (1)), and by sched. I, part 1, it is provided that a scheme may be submitted by any persons who satisfy the Minister that they are sufficiently representative of the persons who produce the product in the area to which the scheme is applicable. So far, therefore, from the marketing board being a government department, its statutory powers, which require a poll of the registered producers to be taken (sect. 3), as well as the approval of the Minister and many other protections that the scheme be representative of the industry, all point to its voluntary nature, albeit it is, in a sense, the creature of legislation.

Doubtless these difficulties were before the mind of the representative of the Potato Marketing Board, Mr. Greenwood, when, on their behalf, he based his refusal to produce the return solely on a section of the Act itself, that is sect. 17, and in terms disclaimed the contention that it was contrary to public policy to disclose the document. He even went so far as to say that the board was perfectly willing to disclose the documents with the consent of the person making the report, that is the plaintiff. No such consent, however, was given, and the learned county court judge held that the document in question was privileged and need not be produced. This the judge did on the basis that he had no power to order production of the documents in court under the *subpœna duces tecum*, not on any narrow ground that he was deciding on the validity of the excuse offered for not producing them that they would tend to criminate the witness, but because, to use his own words, "they were privileged."

In so ruling, I think that the learned county court judge was wrong. The only ground on which he was asked to act and did act was the provision contained in the Agricultural Marketing Act, 1931, s. 17 (2) :

That section states that :

Any person who discloses any information obtained by him in the exercise of any power conferred on him by or under the provisions of this Act relating to polls, or in the exercise of any power conferred by or under this Act on any board, consumers' committee . . . shall be liable on conviction on indictment to imprisonment.

There follows this proviso :

Provided that nothing in this section shall apply to the disclosure of any information in so far as it is required to be disclosed for the purposes of legal proceedings (including arbitrations) under this Act or any scheme made thereunder, or for the purpose of any report of such proceedings, or in so far as the disclosure is required or authorised by this Act, or any scheme made thereunder.

There can be no doubt that, at common law, material evidence of this kind could not properly be rejected. Whether the particular evidence sought to be adduced was oral or whether it was to be obtained

by process of discovery of document, by interrogatory or by the process of *subpoena duces tecum*, if the entirely general contention which has found favour with the judge be correct, the giving of such evidence, by whatever method, would involve the disclosure of information by a servant of the board and could be all similarly resisted. I do not distinguish, therefore, between one class of evidence and another, nor do I think any material difference can be found in the manner in which it is sought that the evidence should be placed before the court. It is a common law right to obtain for the information of the court material evidence and it is essential to the determination of justice that the court should be possessed of it. The right to require the admission of oral evidence is at least as old as the sixteenth century, for a statute of 1562, 5 Eliz., c. 9, compelled attendance of witnesses by methods not dissimilar to the modern process of *subpoena*, a method which had always been used in the Chancery, and, by the end of that century, a body of law had developed both as to documentary and oral testimony which makes it certain that the right to give and duty to receive material evidence had beyond question become a part of the common law. The *subpoena* in the name of the King commands the witness to attend to give evidence, and disobedience, if wilful, is punishable by attachment—4 BLACKSTONE'S COMMENTARIES, p. 234. The Criminal Evidence Act, 1898, s. 4 speaks of the case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

In these circumstances, I ask myself whether the language of sect. 17 is apt to destroy this fundamental common law right and duty. In my view, it is not. In the case of privilege claimed by a government department, as I have pointed out, the Minister may, in appropriate cases, consent to the production of a document; in the present case, if the learned county court judge is right it would similarly be a criminal offence to give the evidence whether the Potato Marketing Board consented to the production of the return or whether the person making the return gave his consent. Moreover, if the evidence were received by the court, and the section applied to such reception, the free giving of that evidence might be a crime, and the law will not readily assume that the doing of an act by it otherwise permitted or acknowledged is a crime. See *Chester v. Bateson* (6), where an unsuccessful attempt was made under the Defence of the Realm Regulations to prevent access to the courts on threat of criminal proceedings.

To protect or prevent a material witness from tendering his evidence, I think that clear unambiguous language in the statute relied upon is essential.

Statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare.

Arthur v. Bokenham (7), at p. 150.

In this case, the language of sect. 17 produces no such result. I do not think that the opening words "Any person who discloses any information" are apt to deal with the case of a person giving evidence under legal process in a court of law, and it is interesting to contrast the absence of any reference to evidence disclosed

in consequence of any compulsory process of any court of law or equity, in any action suit, or proceeding,

to quote the Larceny Act, 1861, s. 85, with the express provision in the Land Transfer Act, 1875, s. 103, that :

Nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer in any legal proceedings, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or in the courts of bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding under this Act.

See also the Bankers' Books Evidence Act, 1879, s. 6, where it is provided in terms that :

A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any bankers' book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

The Companies Act, 1929, s. 314 (2), dealing with the production of documents kept by the registrar, is to the like effect.

In *Lee v. Birrell* (8), the clerk to the property tax commissioners was held bound to produce in a court of justice his official books, though he had been sworn on entering office not to disclose anything he should learn without the consent of the commissioners or by force of an Act of Parliament. LORD ELLENBOROUGH said :

I clearly think the oath contains an implied exception of the evidence to be given in a court of justice in obedience to a writ of *subpœna*.

This case is consistent with *Re Joseph Hargreaves, Ltd.* (9).

Finally, the respondent relied upon the proviso to sect. 17 (2) of the 1931 Act, which I have already quoted. That proviso is dealing with the disclosure of information for the purpose of or for any report of legal proceedings, that is, not in legal proceedings themselves, but in their institution, preparation or record. In so far as it is any aid to construction in the present case, I think the proviso is in favour of the appellant for it goes to show that the legislature has seen fit to protect information gathered for the purpose of the preparation of legal proceedings under the Act and has guarded against the difficulty which

would otherwise arise if the board were precluded through disclosure of information being penal from performing their duties in so far as they may require litigation under this Act.

There is no other reference in the section to legal proceedings and the doctrine *expressio unius est exclusio alterius* cannot here be applied in the manner sought by the respondent.

The legislation here to be considered is not dissimilar to that of the Official Secrets Acts, 1911 and 1920, which make it illegal to communicate certain information other than that authorised to be communicated (Act of 1911, s. 2 (1) (a)). By sect. 6 of the 1920 Act it is made the duty of persons on demand to give information relating to such offences and by sect. 8 (4) of the same Act, if it appears that the publication of any evidence would be prejudicial to the national safety the public may be excluded. It is assumed, apparently, notwithstanding the prohibition of communication of information in the 1911 Act, that such information may be given in evidence among other matters, in a court of law.

This appeal succeeds and a new trial must be ordered between the parties, the costs of this appeal to be the appellant's and the costs of the first trial to abide the decision of the second.

GREENE, L.J. : The substantial question raised by this appeal is whether or not the learned county court judge was right in holding that a return of acreage under potatoes made by the plaintiff to the Potato Marketing Board was a privileged document. The return in question was called for by the board and made by the plaintiff as a registered producer pursuant to clause 76 of the Potato Marketing Scheme which is given statutory force by the Agricultural Marketing Act, 1931, s. 1 (8). Under clause 79 of the scheme a registered producer who fails to make a return when called for or knowingly makes a false statement therein is liable to a monetary penalty. By the form of return in use by the board the plaintiff was required to state the acreage planted by him with each variety of potatoes, including royal kidney potatoes. The acreage which, by the contract between the plaintiff and the defendant, the plaintiff undertook to plant with royal kidney potatoes was some $9\frac{1}{2}$ acres and if this was the only acreage planted with that variety it could follow that the royal kidney potatoes delivered by the plaintiff to another firm must have come from the $9\frac{1}{2}$ acres to the whole produce of which the defendant under his contract was entitled. The evidential importance of the return is therefore manifest. It is alleged by the plaintiff that the royal kidney potatoes delivered by him to the other firm were grown in some 4 acres situated in a different field. If this allegation is true, it would follow that the acreage figure in respect of royal kidney potatoes inserted in the return ought to have been $13\frac{1}{2}$ acres. On the other hand, if the allegation is not true, the correct figure would

be $9\frac{1}{2}$ acres. It does not, of course, follow that even if the figure inserted by the plaintiff in the return turned out to be $9\frac{1}{2}$ acres the defendant would necessarily succeed since the plaintiff might be able to satisfy the judge that an incorrect figure was inserted either intentionally or by inadvertence. Nevertheless the return would afford very important documentary evidence, indeed it is the only documentary evidence available on this issue since the plaintiff kept no copy of the return or any other written record.

It was argued that even if the learned county court judge was wrong in holding that the return was privileged, nevertheless a new trial ought not to be ordered in view of the fact that the plaintiff's evidence as to the planting of the 4 acres with royal kidney potatoes was corroborated by a number of witnesses and that even if the return had shown $9\frac{1}{2}$ acres only as planted with royal kidney potatoes the result of the trial would have been the same. I am unable to take this view. The value of such a piece of documentary evidence is not to be tested by treating it merely as something thrown into the scales. The effect of its production on the plaintiff's evidence and on the evidence of the witnesses who supported him must be considered and it may very well be that it might have led to admissions by the plaintiff which would have compelled the learned county court judge to disregard the evidence of the other witnesses, if indeed they had still stood by the evidence which they gave.

I turn now to the question of privilege which is one of importance. It was not argued that the case falls under any of the recognised heads of privilege. Indeed it could not in my opinion be so argued. The Potato Marketing Board is not a department of state. On the contrary, the scheme of the Agricultural Marketing Acts is to set up machinery for self-government in the industry affected and the board is nothing more or less than a domestic executive body which the legislature has thought fit to entrust with statutory powers. If, therefore, a document in the hands of the board, as the report in question was in this case, is privileged, it can only be by virtue of statutory provision and it is upon statutory provision alone that the argument is based.

The provision in question is contained in the Agricultural Marketing Act, 1931, s. 17 (2). I need not set out its terms. Its effect is to make guilty of an indictable offence any person "who discloses any information obtained by him" in the exercise of powers conferred by or under the Act with a proviso excluding the application of the subsection (as well as that of subsect. (1)) to disclosure of information "in so far as it is required to be disclosed" for certain specified purposes including "the purposes of legal proceedings (including arbitrations) under this Act." The language of the subsection is open to the following preliminary observations: (i) The words creating the offence make no reference to production of documents or the giving of oral testimony in legal

proceedings. (ii) The subsection contains no saving for the case where the owner of an undertaking consents to disclosure as is the case in subsect. (1), and if the respondent's argument is correct the result would be that even if the board and the person who supplied the information both agreed it would not be permissible for the judge to look at a document containing it, or to hear oral testimony relating to it. (iii) If the respondent's argument is correct, the privilege would extend to criminal as well as civil proceedings since the language used does not permit of any implied exception in criminal proceedings.

I find myself unable to construe the language of the subsection as doing more than to impose an obligation of secrecy on those who by virtue of the legislation obtain information which the legislature considers ought to be treated as confidential in character. The production of documents and the giving of oral testimony in legal proceedings stand in a category by themselves, and the special and distinct nature of that category demands in my opinion special and appropriate language to cover it. Privilege is governed by well settled principles and the courts have always jealously safeguarded their powers of compulsion against encroachments by claims of privilege. A recent example is to be found in the decision of the Privy Council in *Robinson v. State of South Australia* No. 2 (10). The expression "discloses any information" *simpliciter* in such a context as the present is in my judgment inapt to cover the case of a person who under legal compulsion produces a document or gives oral testimony in legal proceedings. The appropriate language to use if it were desired to cover these matters would in my judgment have been language providing that the possessor of the information should not be compellable to produce any document containing it or to answer any question relating to it in any legal proceedings.

It may be suggested that the exception contained in the proviso for cases where disclosure is required "for the purpose of legal proceedings (including arbitrations) under this Act" indicates that production is not to be permissible in any proceedings other than proceedings under the Act. In my judgment the proviso points to an opposite conclusion. The saving is not for disclosure "in" legal proceedings under the Act but for disclosure "for the purposes of" such proceedings. This appears to me to give the key to the meaning and object of the proviso and thereby to confirm the view which I have expressed as to the meaning of the subsection. The Act provides for the bringing of legal proceedings by the board (for example, sect. 6 (1) (c)) and for arbitrations between the board and producers (sect. 6 (1) (d)). If the proviso were not there, the board or its officers would be committing an indictable offence if, for the purpose of the proceedings they disclosed information, for example, to solicitors or counsel whom it was desired to instruct or to expert witnesses whom it was desired to call. The fact that an exception is made and

has to be made for this purpose appears to me to show that the subsection is only intended to provide for the ordinary obligation of secrecy.

During the argument I asked counsel on both sides whether they could refer to any statutory provision which in terms provided that a particular kind of document should be privileged from production but they were unable to do so. My own researches have not produced any results of great importance, but for what they are worth I will state them. The Banker's Books Evidence Act, 1879, s. 6, provides that a banker shall not in any legal proceedings to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under the Act or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by an order of the judge. The Companies Act, 1929, s. 314 (2) provides that no process for compelling the production of any document kept by the registrar shall issue from any court except with the leave of that court. It is right to observe that both these provisions are consequential upon provisions providing for proof of the documents concerned by means of copies and an express reference to the production of originals was therefore necessary. But the language used may I think be referred to as showing what words are appropriate for dealing with the special matter of production of documents and the giving of oral testimony in legal proceedings. Similar observations apply to the Criminal Evidence Act, 1898, s. 1 (f).

The Income Tax Act, 1918, contains in sched. 4 forms of declaration to be made by commissioners, surveyors and others. If I may take the surveyors' declaration, it is to the effect that the declarant

will not disclose any particular contained in any statement return . . . any evidence or answer given by any person who shall be examined . . . except to such persons only as shall act in the execution of the said Act and where it shall be necessary to disclose the same to them for the purposes of the said Act, or to the commissioners of inland revenue, or in order to, or in the course of, a prosecution for perjury committed in such examination, affidavit or deposition.

I do not think that this language, which is not dissimilar to that used in the present case, covers the case of production of documents or the giving of oral testimony in legal proceedings. The documents and the information are entitled to privilege on a different ground, namely, that they are official matters the disclosure of which would be against the public interest, provided, of course, that the claim to privilege on this account is made in the proper way by the responsible head of the department. The matter is discussed in the introduction to DOWELL'S INCOME TAX LAWS, 9th Edn., pp. 141 to 145. In the case of *Re Joseph Hargreaves, Ltd.* (9), to which SLESSER, L.J., has called my attention, an application was made under the Companies Act, 1862, s. 115 (now Companies Act, 1929, s. 214), for an order on a surveyor of taxes to attend for examination and produce documents. The application was

resisted by the surveyor on two grounds, namely, that to produce the documents would be a violation of his oath (by which I assume is meant the declaration) and that production would be against public policy. In support of the latter ground an affidavit by the secretary to the commissioners for inland revenue was produced. WRIGHT, J., refused the application on this latter ground alone and no reference is made to the oath either in his judgment or in the judgments of the Court of Appeal. It does not even appear to have been argued by counsel that the oath on its true construction applied to production of documents in legal proceedings.

The last reference which I desire to make is to the Income Tax Act, 1918, s. 212, which protects assessors, collectors and others from being called upon by assessment committees for copies of or extracts from certain specified documents and it goes on to provide that

nor shall any such person be required to attend before any such committee to produce any such assessment, rate, rate book or document, or to be examined concerning the same.

For the sake of completeness I may mention that a provision very similar to that now in question is contained in the Coal Mines Act, 1930, s. 8. My opinion is that if the legislature had intended in these cases to create a new form of statutory privilege it would have said so in clear language, using words appropriate to cover the production of documents and the giving of oral testimony in legal proceedings.

I concur in the order proposed by SLESSER, L.J.

Solicitors: *Burton, Yeates & Hart*, agents for *Southwell, Dennis & Farrow*, Wisbech (for the appellant); *Metcalfe, Copeman & Pettefar* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

FINNEY v. THE MAYOR, ALDERMEN AND BURGESSES OF THE COUNTY BOROUGH OF BIRKENHEAD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., du Parc and Singleton, JJ.), **May 26, 1936.**]

Highways—Repairable by inhabitants at large—Adoption of street—Exception of footway—Notice to repair footway—Make, curb, flag and complete—Asphalt substituted for flags—Recovery of cost.

The predecessors of the respondent corporation by notice adopted H. Road under the Public Health Act, 1875, s. 152. In accordance with the provisions of the Public Health Act, 1925, the respondents prepared a list of roads repairable by the inhabitants at large. H. Road was therein stated to be repairable by the local authority as to the carriage-way, but not as to the footway. There was some evidence that the road had never been made up. The respondents were empowered by

a local Act to serve notice upon the frontagers to make, curb, flag, and complete the footway, and if through the frontagers' default, they executed the work themselves, to apportion the whole cost on the frontagers in the case of a road not repairable by the inhabitants at large, and half the cost in the case of a road repairable by the inhabitants at large. Such notice was served in respect of H. Road and, the respondents having done the work, apportioned the whole cost on the frontagers. The notices required the frontagers to make, flag and complete, but in fact the respondents did not flag the road, but asphalted it :—

HELD : (i) H. Road was a road repairable by the inhabitants at large and, in any event, the respondents could only recover half the cost.

(ii) the work specified in the notice must be carried out and the use of asphalt in place of flags was not a proper compliance with the notice, and the respondents could not recover the cost of the work done.

[EDITORIAL NOTE. This case includes two points of interest. The first is an attempt to prove that an adoption of a road as far back as 1887 was *ultra vires*, because the road had not been previously made up. The second and more interesting point is that a notice served on frontagers ordering them (*inter alia*) to "flag" a footway will not permit the local authority, when in the ordinary course of events they come to do the work themselves, to asphalt the footway, although the cost of flagging would be higher. The notice must be substantially complied with and this is not a substantial compliance.

AS TO POWER OF LOCAL AUTHORITY TO EXECUTE WORKS, see HALSBURY, Hailsham Edn., Vol. 16, p. 444, para. 644; and FOR THE CASES, see DIGEST, Vol. 26, p. 529, Nos. 2275-2280. AS TO THE ADOPTION OF STREETS, see HALSBURY, Hailsham Edn., Vol. 16, para. 291, 292, para. 362; and FOR CASES, see DIGEST, Vol. 26, p. 374, No. 996.]

Cases referred to :

- (1) *Acton Local Board v. Lewsey* (1886), 11 App. Cas. 93; 26 Digest 529, 2276.
- (2) *Kershaw v. Sheffield Corpn.* (1887), 51 J.P. 759; 26 Digest 529, 2277.

APPEAL by way of case stated from an order of the justices of the county borough of Birkenhead, ordering the appellant to pay to the Corporation of Birkenhead the sum of £16 15s. 8d.

The material facts stated in the case as to the adoption are set out in the judgment of LORD HEWART, L.C.J., and the list of streets prepared under the Public Health Act, 1925, stated that the carriage-way but not the footway of Howbeck Road was repairable by the local authority. The justices found from their own knowledge and upon the evidence of the deputy surveyor that Howbeck Road had never been paved, flagged or metalled, but had had a modern surface applied at some time later than 1886.

By the Birkenhead Corporation Act, 1881, s. 30, the corporation may, after giving notice in accordance with the Public Health Act, 1875, to the owners of premises abutting upon an unpaved footway in a street repairable by the inhabitants at large, "make, curb, flag and complete" the footway, and recover from the owners half the cost of the work. If the street is not repairable by the inhabitants at large, they may recover the whole cost from the owners. The appellant was the owner of premises abutting on an unmade footway in Howbeck Road, which the

corporation claimed was not a highway repairable by the inhabitants at large. Notice was given to the appellant in accordance with law on Sept. 29, 1934, to make, flag and complete that part of the footway on which his premises abutted. He did not do so, and the corporation undertook the work. Instead of flagging the footway, however, they laid an asphalt surface. They sought to recover from the appellant £16 15s. 8d., the apportionment of the whole cost. As he disputed liability, they took proceedings before the justices, who found that the appellant was liable to pay the sum claimed.

Maurice FitzGerald for the appellant.

Maxwell Fyfe, K.C., and *Ralph Etherton* for the respondents.

LORD HEWART, L.C.J.: In my opinion this appeal ought to be allowed. I think that the argument—and, if I may say so, the excellent argument—of Mr. FitzGerald is in substance correct. There are really two points which are submitted for the opinion of this court. The first is whether, upon the evidence, the true conclusion is that Howbeck Road had in law been adopted both as to the carriage-way and as to the footway, and in consequence whether it has to be considered under the first part or the second part of sect. 30 of the Birkenhead Corporation Act, 1881. The second question is whether the respondents have complied with the provisions of the Birkenhead Corporation Act, 1881, s. 30, to make, curb, flag and complete such footway or footways as they from time to time deem necessary.

I will deal with those two questions in the order in which they are put, although it is not the order in which they have been argued. It seems to me to be clear on the evidence that Howbeck Road was in law adopted as a highway repairable by the inhabitants at large, and if so there is no doubt as to the part of sect. 30 of the Birkenhead Corporation Act, 1881, that applies to it. The case stated finds:

That Lingdale Road was in the township of Oxtan and under the jurisdiction of the Oxtan Local Board of Health until the incorporation of that township with the county borough of the respondents in the month of December in the year 1877. That the Oxtan Local Board of Health by resolution dated first day of October 1877 and by notices properly given as to form and time purported to declare that the said Lingdale Road (now Howbeck Road) was a highway repairable by the inhabitants at large. By the said resolution it was directed that notice in writing to that effect should be put up in the said street.

Afterwards, when a list of streets repairable by the inhabitants at large came to be prepared in accordance with the provisions of the Public Health Act, 1925, Howbeck Road was entered as a street repairable by the inhabitants at large subject to some qualifications. Evidence was offered to contradict the effect of the resolution of October, 1877; in my opinion there was no admissible evidence which could contradict it. I think upon the evidence offered, and the admissible evidence which was offered, the conclusion is that the resolution of October, 1877, stands,

and that Howbeck Road, formerly Lingdale Road, is and was at all material times a highway repairable by the inhabitants at large.

That conclusion would go only to the question of *quantum* if other things were in order, and that brings me to the second question, which is, perhaps, not framed quite in the way in which it might have been framed on the case stated. Some questions may arise—and indeed they have been suggested—with regard to the construction of sect. 30 as to which I entertain a clear view, especially when I look at sect. 30 in juxtaposition with the Birkenhead Corporation Act, 1881, s. 33; but I do not think it necessary to deal with that larger matter for the purposes of this case. Sect. 30, however, does clearly provide that before the corporation can act, it must give notice “according to and in other respects in compliance with the provisions of the Public Health Act, 1875, to the owners of the premises abutting” upon the footway in question; and that notice is a notice to “make, curb, flag and complete such footway or footways.” The words “as they may from time to time deem necessary” are not in point in this case, and, of course, they have decided with regard to this particular highway. But then, if there is default on the part of the owner, the local authority may, after such notice, “recover from such owners as aforesaid one-half of the costs of so making, curbing, flagging and completing the same summarily or as private improvement expenses.”

I attach great importance to that word “so.” The section does not in the least provide that the local authority can give notice for one kind of work and then proceed, upon default, to do another kind. The notice must be a notice which fulfils the terms of this section, and it must be a notice which is according to and in other respects in compliance with the stringent provisions of the Public Health Act, 1875. That section, which I think is sect. 150, requires, as is only reasonable, the greatest particularity where individuals are being required by a local authority to do work which, if they neglect to do it, the local authority will carry out at their expense. In the present case the notice which is attached to the case stated says quite clearly that the owners, of whom this appellant is one, are required “to make, curb, flag and to complete such footway within the space of fourteen days from the date hereof,” and a further notice that, failing compliance, “the corporation will in pursuance of the said statutes proceed to make, curb, flag and complete such footway”; and moreover, “the works required to be done are to be in accordance with plans and specifications which may be inspected” during named hours. To my mind it is inconceivable that those plans and specifications could have been plans and specifications for work other than making, flagging and completing the footway. The corporation here, upon default, proceeded to do certain work, the case stated says, “in pursuance of their said notice”; it was not in

pursuance of their notice. They asphalted the footway, and they urge as an excuse that the asphalt was cheaper than flagging. Can a local authority be said so to make, flag and complete a footway when, having required the owners to flag, they asphalt it ?

Our attention has been directed to two cases which seem to me to be very much against the contention of the respondents. In the year 1886, a long time ago, there was the case of *Acton Local Board, v. Lewsey* (1), which went to the House of Lords. There notice was given to the owner to pave a part of a street, and the notice specified the materials and the method ; one of the details specified was that some concrete was to be laid down. The owner having made default, the sanitary authority did the work themselves, but for economy omitted the concrete, because on further reflection they thought that that particular ingredient was unnecessary. LORD HALSBURY, in giving judgment, said this, at page 95 :

It would, I think, be an abuse of the power so conferred, if the local board did not procure the work (and it must, of course, be substantially the same work) to be done as cheaply as possible.

“ It must, of course, be substantially the same work.” How can it be argued that, when a man is told to flag, it is substantially the same work if the local authority asphalts ? The other case was a case of slightly more recent date, in the year 1887 : *Kershaw v. Sheffield Corporation* (2). There an urban sanitary authority had given notice to an owner of land adjoining a street to sewer the road. The order was to make a sewer, and in detail it was ordered that an 18-inch pipe should be laid. The owner neglected to do the work ; the authority took on the work and found that a 12-inch pipe was sufficient, and that 12-inch pipe was used and, in fact, was cheaper. It was there held that the apportionment expenses were recoverable. Why ? Because the alteration was not a material matter. The point was that there must be a sewer, and the difference between an 18-inch pipe and a 12-inch pipe was immaterial. As A. L. SMITH, L.J., said in the concluding words of his judgment :

The magistrate thought that there had been merely an alteration in a matter of detail, and as that alteration had served the purpose and saved expense to the appellant, the corporation were, nevertheless, entitled to recover the apportioned expense from the appellant.

It seems to me impossible to contend that here there was a mere alteration of a matter of detail. One kind of making up the footway was required ; another kind of making up the footway was, in fact, carried out. It is quite obvious, when one looks at this section and the adjoining sections, that the authors of this Act were perfectly well aware of the contrast between the comparatively cheap method of making an asphalt footway and the comparatively expensive method of flagging. In my

opinion, therefore, the appeal ought to succeed, and the order which was made upon this appellant to pay a sum of money ought to be quashed.

DU PARCQ, J. : I have come to the same conclusion. I agree that upon the admissible evidence before them the justices were bound to hold that this was a highway repairable by the inhabitants at large, and I have nothing to add to what has been said by my Lord, the LORD CHIEF JUSTICE, upon that point. With regard to the other part of the case, I wish to base my decision upon the point taken that the requirements of sect. 30 of the local Act were not fulfilled because the requisite notice was not given. The question for consideration would have been different if the local authority had given a notice calling upon the frontagers to complete by asphaltting the road. I express no opinion as to what the result of that would have been one way or the other ; that is not the question which we have to decide to-day. Speaking for myself, what I feel no difficulty about deciding is that it is impossible when one looks at the notice, which was to make, flag and complete the footway, to say that it entitled the corporation subsequently not to make, flag and complete the footway but to asphalt the footway, which is an entirely different process, and then recover half the cost from the frontager. It is necessary, because of the way in which sect. 30 of the local Act is drafted, to read it, together with sect. 150 of the Public Health Act, 1875. The corporation have to give notice "according to and in other respects in compliance with the provisions of the Public Health Act, 1875," and the relevant section is sect. 150. One may summarise that in this way : if the corporation think that a footway is not satisfactorily made up they may give notice to the frontagers to do certain work. Before they give that notice the authority must have plans made of the work and an estimate of its cost, and then the section goes on :

If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein ; and may recover in a summary manner the expenses incurred by them in so doing.

It seems to me impossible to say in this case that the expenses which have been incurred, have been incurred in executing the works mentioned or referred to in the notice which was given to the frontagers. I agree with what my Lord has said as to the decisions which were cited to us. It cannot be said that the work of asphaltting is substantially the same work as the work of flagging, and on that ground I am of opinion that the authority have failed to show that they are entitled to recover one-half of the cost of anything that they did from the appellant.

SINGLETON, J. : I am of the same opinion. The finding of the justices that "the carriage-way in Howbeck Road, formerly Lingdale

Road, had never been paved or flagged or metalled, but has had a modern surface applied at some time later than 1886," is based upon their further finding in para. 5 of the case. That is based upon what they say the evidence before them was. I very much doubt whether there was any admissible evidence before the justices on which they could come to that conclusion, but in any event I am satisfied that there was no evidence which would have the effect of wiping out that which is the finding in para. 4 (15) of the case. When one looks at the copy of the notice, which is appendix 2 in the case, one finds this recital. It is dated October, 1877, and it states that the street :

not being, at the date of this notice, a highway repairable by the inhabitants at large, has been sewered, levelled, paved, flagged, metalled, channelled and made good, and provided with proper means of lighting to our satisfaction,

and then it declares that the street is a highway repairable by the inhabitants at large. I think there was no evidence on which the justices could find to the contrary.

As to the second point, the only right of the local authority to recover half of the expenses of doing the works is based upon the Birkenhead Corporation Act, 1881, s. 30. [His Lordship read the section.]

The corporation gave a notice, calling upon the frontagers to make, flag and complete such footway. That work has not been done by the corporation. In those circumstances I cannot see how they can claim to recover from the frontagers one-half of the cost of so making, flagging and completing; they have not done the work of which they gave notice on Sept. 29, 1934. In those circumstances they cannot recover the cost of so making, flagging and completing. Whether the corporation could have given a notice merely to complete and thereafter could have recovered the cost of asphaltting is a question on which this court expresses no opinion, so far as I understand; I certainly do not; it is not a matter that has been argued before us. It is sufficient for the purposes of this decision to say that the corporation have not done the work which is embraced in their notice, and consequently they are not entitled to recover under the terms of sect. 30 of the Act of 1881.

Solicitors: *Layton & Co.* (for the appellant); *E. W. Tame*, Town Clerk, Birkenhead (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

HAIN STEAMSHIP COMPANY, LTD., v. TATE & LYLE, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, M.R., and Lord Maugham), **July 20, 1935, April 23, 24, 27, June 11, 1936.**]

Shipping—Charterparty—Indorsees of bills of lading—Ships to go to loading ports as ordered—Orders not received by master owing to non-delivery of cablegram—Lien of shipowners—Freight—Deviation—Claim for return of deposit contributed in general average.

By a charterparty a firm, having sold sugar to the respondents, chartered the appellant's steamer "Tregenna" to load the sugar at two ports in Cuba and at one port in San Domingo "as ordered." The charterers, by notice to the appellants' agents in New York, specified two loading ports in Cuba and one in San Domingo. The "Tregenna" loaded sugar at the first Cuban port and was sent on by the local agents of the charterers to the second Cuban port. A cablegram directing the steamer to call at a loading port in San Domingo was not delivered to the master, who therefore left Cuba for home with a considerable cargo space unoccupied. Shortly afterwards the steamer was recalled by wireless and ordered to go to the loading port in San Domingo where she completed loading. On leaving San Domingo on the homeward voyage the "Tregenna" stranded and was badly damaged. The sugar had to be discharged and part of it was lost. The cargo was brought home in another steamer, and to obtain possession of it the respondents signed a Lloyd's average bond under which they were required to deposit £9,500 to cover an adequate proportion of general average charges. The present respondents, indorsees of the bills of lading, brought an action against the present appellants claiming the return of their deposit under the bond, and a declaration that they were not liable to contribute in general average in respect of the Cuban sugar, on the ground that there had been an unjustified deviation from the charterparty voyage. The appellants counterclaimed for proper contribution in general average and for the balance of freight:—

HELD: (i) although there was an unjustified deviation it was waived by the charterers, and the charterparty thus remained in force.

(ii) the respondents, as indorsees of the bills of lading, were not personally liable to contribute to the general average loss as they had not waived the deviation; but as the general average contributions were chargeable on the goods, and the appellants gave up their lien in consideration of the respondents' undertaking in the bond to make the proper contribution in general average, the respondents were bound by the bond to make such contribution.

(iii) there was no implied obligation to pay the balance of freight.

Order of Court of Appeal reversed and order of ROCHE, J., restored but varied.

[EDITORIAL NOTE.] Their Lordships in the present case consider the effect of deviation upon a contract of carriage by sea. They are clear that slight deviation is to be treated as an "anticipatory breach," that is, it gives rise to an option to be exercised by the other party to accept the deviation as a breach and to give notice thereof, or the latter may, if he so elects, continue with the contract and claim such damage for delay as the deviation causes. If the charterer elects to continue with the contract, i.e., to continue the voyage, he waives the deviation. This waiver, however, may not affect the indorsees of a bill of lading and in the circumstances of the present case was held not to affect them. The indorsees had,

however, entered into a Lloyd's bond which obliged them to contribute to general average charges and this was quite a separate matter. The ship having given up its lien on the cargo and given immediate instead of delayed delivery, might recover on the Lloyd's bond, though precluded from recovering on the contract of carriage.

AS TO DEVIATION, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 95, 96, paras. 170-172, and FOR THE CASES, see DIGEST, Vol. 41, pp. 487-490, Nos. 3182-3195.]

Cases referred to :

- (1) *Louis Dreyfus & Co. v. Tempus Shipping Co.*, [1931] A.C. 726 ; Digest Supp.
- (2) *Strang, Steel & Co. v. Scott (A.) & Co.* (1889), 14 App. Cas. 601 ; 41 Digest 592, 4165.
- (3) *Morrison (James) & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd.*, [1916] 2 K.B. 783 ; 41 Digest 486, 3176.
- (4) *Matthews v. Smallwood*, [1910] 1 Ch. 777 ; 31 Digest 379, 5251.
- (5) *Joseph Thorley, Ltd. v. Orchis S.S. Co., Ltd.*, [1907] 1 K.B. 660 ; 41 Digest 488, 3185.
- (6) *Leduc v. Ward* (1888), 20 Q.B.D. 475 ; 41 Digest 485, 3172.
- (7) *United States Shipping Board v. Bunge y Born Limitada Sociedad* (1925), 31 Com. Cas. 118, *on appeal from* 30 Com. Cas. 129 ; 41 Digest 486, 3179.

APPEAL from an order of the Court of Appeal (SCRUTTON and SLESSER, L.J.J., GREER, L.J., dissenting) reversing an order whereby ROCHE, J., gave judgment for the defendants (the present appellants).

The facts and the arguments are fully referred to in the judgments.

Sir Robert Aske, K.C., and *Cyril Miller* for the appellants.

I. H. Stranger, K.C., and *Stephen Furness* for the respondents.

LORD ATKIN : My Lords, this case arises on an appeal from the Court of Appeal who reversed a decision of ROCHE, J., in an action in which the present respondents were plaintiffs and the appellants were defendants. The learned judge gave judgment for the defendants on claim and counterclaim : the Court of Appeal reversed the decision and determined both claim and counterclaim in favour of the plaintiffs. Messrs. Tate and Lyle, the respondents, in March, 1930, bought 25,000 tons of Cuban sugar from Messrs. Farr & Co., of New York, on c.f.i. terms. In February, they had bought 50,000 tons Cuban and/or S. Domingo sugar from Cuban Dominican Sales Corporation of New York on similar terms. These sellers are said to be closely associated with Messrs. Farr & Co. In order to perform the contracts, Messrs. Farr & Co., on July 16, 1930, chartered from the appellants the s.s. "Tregenna" on terms whereby the vessel was to proceed to Cuba and load a full and complete cargo of sugar in bags not exceeding 7,770 tons and not less than 7,030 tons at one or two safe ports on the north side or at one or two safe ports on the south side and at one safe port on the south side of San Domingo as ordered from the factors of the charterers. Freight was to be paid at 13s. 6d. per ton sterling in New York as to 50 per cent. in cash on receipt of cable advice of signing of bills of lading and the balance in cash on receipt of

cable advice of right delivery of cargo and the net delivered weight ascertained. On July 28, 1930, Farr & Co., as chartered owners of the "Tregenna," entered into a charterparty with the Cuban Dominican Sales Corporation whereby it was agreed that the vessel should proceed to San Domingo and there load at one safe port on the south side from the factors of the charterers a cargo of sugar in bags not exceeding 2,780 tons nor less than 2,040. The provisions as to freight corresponded to those in the principal charter.

The dispute between the parties arises out of events that happened in the course of the voyage of the "Tregenna." Under the charterparty the charterers named Casilda and Santiago as the two Cuban ports: while the ship was loading at the first port, Casilda, the charterers declared the San Domingo port, San Pedro Macoris, on the south side of the island to the owners. The owners sent the necessary cable to the ship at Casilda, but owing to an alleged default of the post office authorities in Cuba it never reached its destination. The ship, after taking in cargo at Casilda, proceeded to Santiago and there loaded that portion of cargo. Having received no orders for a San Domingo port the master indorsed the bills of lading for dead freight, as he had only 4,990 tons on board instead of the full and complete cargo stipulated in the charterparty, and then cleared for Queenstown, whither he was to proceed for orders. He sailed for Queenstown at noon on July 29, proceeding between Cuba and San Domingo northward. The direct route to San Pedro would have been south of the island. Within a few hours all parties, including Messrs. Farr & Co., became aware of the mistake, and a radio message was sent to the captain when off the Island of Inagua directing him to proceed to San Pedro. He obeyed orders, taking the shortest route which from the point he had reached took him round the north of San Domingo. He arrived at San Pedro on Aug. 2. There the "Tregenna" was loaded with the cargo under the sub-charter, about 2,780 tons, under the supervision of Tate & Co., who were Messrs. Farr & Co.'s agents at San Pedro. Bills of lading were given to the sub-charterers. She sailed again from San Pedro on Aug. 6, but, while leaving harbour, stranded, and received serious damage. The cargo was discharged, and such as was not lost was transhipped by Hain & Co. on another vessel, the "Baron Dalmeny," on bills of lading indicating Hain & Co. as the shippers. It is in respect of this casualty that a general average contribution is claimed by the ship. The "Tregenna" bills of lading were indorsed and delivered to Messrs. Tate & Lyle in pursuance of the contracts of sale; with a delivery order indorsed upon them addressed to the owners of the "Baron Dalmeny" by Hain & Co. requesting the owners to deliver to Tate & Lyle or order. On the same day, and no doubt as a condition of the release of Messrs. Hain & Co., Messrs. Tate & Lyle entered into a Lloyd's average bond on the terms of which in my

opinion this case turns. They duly made the necessary deposit : and in due course received the goods. Later they discovered the alleged deviation, and commenced this action against the Hain Co. to recover so much of the deposit as covers the claim for general average contribution in respect of the sugar shipped at the Cuban ports, i.e., before the deviation. In respect of the sugar shipped at San Pedro, i.e., after the ship had returned to the contract voyage, they admit liability. The defendants counterclaim for a declaration that the plaintiffs are liable in general average in respect of the whole cargo, and also claim the balance of freight or a corresponding *quantum meruit* for freight in respect of the whole cargo. For the balance of freight in respect of the San Pedro shipment the plaintiffs admit liability and have paid a sum into court to satisfy that claim. For the balance of freight on the Cuban shipment whether on express contract or *quantum meruit* the defendants deny liability. At the original trial ROCHE, J., held that there had not been a deviation and gave judgment for the shipowner : in the Court of Appeal all the Lords Justices were of opinion that there was a deviation. SCRUTTON and SLESSER, L.JJ. held that the effect was to entitle the plaintiffs to succeed in the action on claim and counterclaim. GREER, L.J., found that the deviation had been waived by Messrs. Farr & Co., the charterers, and that this had the effect of leaving them liable to a general average contribution, which on the terms of the Lloyd's bond could be claimed by the ship against the plaintiffs. They all agreed that there was no claim for freight. On appeal to this House your Lordships being of opinion that there appeared to have been a deviation but that on the question of waiver the plaintiffs might have been led by the state of the pleadings to consider that no such issue was raised and might therefore have further evidence to adduce allowed an amendment to raise the issue expressly, and remitted the issue for report to the King's Bench Division. Evidence on the issue was heard by BRANSON, J., and your Lordships have his report. I entirely agree with the judgments in the Court of Appeal that in fact there was a deviation from the chartered voyage and I say no more on this topic. Moreover, I see no reason whatever to differ from the report of BRANSON, J., that the deviation was waived by Messrs. Farr & Co.

My Lords, the effect of a deviation upon a contract of carriage by sea has been stated in a variety of cases but not in uniform language. Everyone is agreed that it is a serious matter. Occasionally language has been used which suggests that the occurrence of a deviation automatically displaces the contract, as by the now accepted doctrine does an event which "frustrates" a contract. In other cases where the effect of deviation upon the exceptions in the contract had to be considered language is used which Sir Robert Aske argued shows that the sole effect is as it were to expunge the exceptions clause, as no longer applying

to a voyage which from the beginning of the deviation has ceased to be the contract voyage. I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, but a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of its terms. I wish to confine myself to contracts of carriage by sea: and in the circumstances of such a carriage I am satisfied that by a long series of decisions adopting in fact commercial usage in this respect any deviation constitutes a breach of contract of this serious nature. The same view is taken in contracts of marine insurance where there is implied an absolute condition not to deviate. No doubt the extreme gravity attached to a deviation in contracts of carriage is justified by the fact that the insured cargo owner when the ship has deviated has become uninsured. It appears to me inevitable that a breach of contract which results in such momentous consequences well known to all concerned in commerce by sea should entitle the other party to refuse to be bound. It is true that the cargo owner may, though very improbably, be uninsured: it is also true that in these days it is not uncommon for marine insurers to hold the assured covered in case of deviation at a premium to be arranged. But these considerations do not appear to diminish the serious nature of the breach in all the circumstances of sea carriage; and may be balanced by the fact that the ship can, and often does, take liberties to deviate which prevent the result I have stated. If this view be correct then the breach by deviation does not automatically cancel the express contract, otherwise the shipowner by his own wrong can get rid of his own contract. Nor does it affect merely the exceptions clauses. This would make those clauses alone subject to a condition of no deviation, a construction for which I can find no justification. It is quite inconsistent with the cases which have treated deviation as precluding enforcement of demurrage provisions. The event falls within the ordinary law of contract. The party who is affected by the breach has the right to say, I am not now bound by the contract whether it is expressed in charterparty, bill of lading or otherwise. He can, of course, claim his goods from the ship; whether and to what extent he will become liable to pay some remuneration for carriage I do not think arises in this case for reasons I will give later: but I am satisfied that once he elects to treat the contract as at an end he is not bound by the promise to pay the agreed freight any more than by his other promises. But on the other hand, as he can elect to treat the contract as ended, so he can elect to treat the contract as subsisting: and if he does this with knowledge of his rights he must in accordance with the general law of contract be held bound. No doubt one must be careful to see that the acts of the

cargo owner are not misinterpreted when he finds that his goods have been taken off on a voyage to which he did not agree. He could not reasonably be expected to recall the goods when he discovers the ship at a port of call presumably still intending to reach her agreed port of destination. There must be acts which plainly show that the shipper intends to treat the contract as still binding. In the present case where the charterer procured the ship to be recalled to a San Domingo port for the express purpose of continuing to load under the charter, an obligation which, of course, only existed in pursuance of the express contract, and saw that the ship did receive the cargo stipulated under the sub-charter provided by persons who had no right to load except under the sub-charter, I am satisfied that there is abundant, indeed conclusive, evidence to justify the report of BRANSON, J., that the deviation was waived by the charterers.

The result is that at the time the casualty occurred and the general average sacrifice and expenses were incurred the ship was still under the charter. In respect of the Cuban sugar the charterers appear to have been at the time the owners of the goods; and I think it clear that on principle the contribution falls due from the persons who were owners at the time of the sacrifice: though no doubt it may be passed on to subsequent assignees of the goods by appropriate contractual stipulations. The place of adjustment does not seem to have a bearing upon the question against whom the contribution has to be adjusted. It must be remembered that at any rate so far as the Cuban sugar is concerned at the time of loss and until transfer of the bills of lading in October, Messrs. Farr were the only persons in contractual relation with the ship. The bills of lading which they held were in their hands merely receipts for shipment and, of course, symbols of the goods with which they could transfer the right to possession and the property. It follows that when the "Baron Dalmeny" arrived at Greenock Messrs. Hain & Co., who were through their bills of lading in possession of the goods, had a claim for contribution against the charterers, and for the reasons given by GREER, L.J., in his admirable judgment, with which I find myself in entire accord, had a lien upon the goods for that contribution.

Now the position of the respondents, Messrs. Tate & Lyle, has to be considered from two points of view—(a) as indorsees of the bills of lading in circumstances in which the rights and liabilities expressed in the bill of lading would devolve upon them as though the contract contained therein had been made with them (under the Bills of Lading Act); (b) as parties to Lloyd's bond.

In respect of the first, in my opinion the fact of deviation gives the bill of lading holder the rights I have already mentioned. On discovery he is entitled to refuse to be bound by the contract. Waiver by the charterer seems on principle to have no bearing upon the rights and

liabilities which devolve upon the bill of lading holder under the Bills of Lading Act. The consignee has not assigned to him the obligations under the charterparty: nor in fact any obligation of the charterer under the bill of lading, for *ex hypothesi* there are none. A new contract appears to spring up between the ship and the consignee on the terms of the bill of lading. One of the terms is the performance of an agreed voyage, a deviation from which is a fundamental breach. It seems to me impossible to see how a waiver of such a breach by the party to the charterparty contract can affect the rights of different parties in respect of the breach by the same event of the bill of lading contract. I think, therefore, that a deviation would admittedly preclude a claim for contribution arising against parties to a subsisting contract of carriage, though no doubt the claim does not arise as a term of the contract: and as the bill of lading holder is entitled to say that he is not bound by the agreed term as to freight, the ship could not in the present circumstances claim against the plaintiffs either contribution or freight if they had to rely on the bill of lading alone.

On the other hand the terms of the Lloyd's bond appear in the plainest words to give to the ship the right they claim in respect of contribution. The consignees agree to pay to the owners the proper proportion of general average charges "which may be chargeable upon their respective consignments" or "to which the shippers or owners of such consignments may be liable to contribute." General average charges were, as I have said, chargeable by way of lien against the sugar: and the shippers were liable to contribute. The obligation is independent of the bill of lading, there is good consideration in the ship giving up a lien which it claims, and giving to the consignees immediate and not delayed delivery. I do not attach any importance in this case to the without prejudice provisions in the third part of the bond, which affect only the deposit: and would not in any case apply where there was in fact a good claim for contribution against the original shippers. I think, therefore, that the claim of the plaintiffs which is directed to recovering the deposit made in respect of the Cuban sugar fails and that the ship's claim for a declaration that there is a valid claim for contribution against the deposit succeeds. On the ship's claim for the balance of freight in respect of the San Domingo sugar I have come to the conclusion that it must fail. That there is no claim on the express contract—the bill of lading—I have already said. An amendment to claim a *quantum meruit* was however allowed, and this has occasioned me some difficulty. I am not prepared at present to adopt the view of SCRUTTON, L.J., that in no circumstances can a consignee, whether holder of a bill of lading or not, be liable to pay after a deviation any remuneration for the carriage from which he has benefited. I prefer to leave the matter open, and in those circumstances to say that the opinion of the Court of Appeal to the contrary

in this case should not be taken as authoritative. In the present case I find that the balance of freight under the charterparty, and therefore under the bill of lading, was to be paid in New York after advice of right delivery and ascertainment of weight. The terms of the cesser clause do not affect this obligation, and consequently the charterer remained and remains still liable for that freight. In these circumstances I am not satisfied that conditions existed under which a promise should be implied whereby the shippers undertook to give to the ship a further and a different right to receive some part of what would be a reasonable remuneration for the carriage. I think, therefore, that the claim for freight fails.

My Lords, I think your Lordships are agreed that before formulating the questions to be put to the House, you would desire the assistance of counsel on the question of costs, and therefore I postpone the formulation of the motion to be proposed until your Lordships have had an opportunity of hearing counsel at the bar.

LORD THANKERTON : My Lords, I concur in the opinin which has just been delivered by my noble and learned friend on the Woolsack. I have also had an opportunity of considering the opinion of my noble and learned friends, LORD WRIGHT, M.R., and LORD MAUGHAM, and I desire to express my concurrence in their views also.

LORD MACMILLAN : My Lords, I also concur.

LORD WRIGHT, M.R. : My Lords, the principal questions on this appeal are (1) whether the appellants as owners of the steamship "Tregenna" are entitled to retain out of a deposit made under a Lloyd's average bond the proper contribution in general average chargeable on certain cargo received by the respondents as bill of lading holders at Greenock ; (2) whether they are entitled to be paid the balance of freight due in respect of that cargo. The Court of Appeal have by a majority denied the appellants' right in either regard ; GREER, L.J., however, dissented in respect of the former matter, holding that the appellants' claim on that head was justified.

The "Tregenna" had been chartered by Farr & Co., of New York, under charterparty dated July 16, 1930, to carry a full cargo of sugar from three ports in the West Indies, two in Cuba and one in San Domingo as ordered. The difficulties in the case have arisen because, by a curious accident, the master after loading at two ports (viz., Casilda and Santiago de Cuba), in Cuba, 4,990 tons of sugar, proceeded direct to Queenstown for orders, in the belief that no order had been given to load at a port in San Domingo. In fact, the charterers had duly given orders for a port in San Domingo (San Pedro de Macoris) to the ship's agents in New

York who had cabled these orders on to the master at Casilda ; but a lorry driver in Cuba, who undertook to take the cable from the cable office to Casilda, failed to do so, and the master never got it. He accordingly started direct to Queenstown—indorsing the bills of lading for dead freight. But when the “Tregenna’s” departure was cabled to New York, steps were immediately taken by cable and wireless to remedy the mistake ; the master was notified of the error the day after he left Santiago ; he turned back immediately and proceeded to San Pedro de Macoris, where he duly arrived a little over a day later than if he had gone direct and after having done 265 miles of extra steaming. ROCHE, J., held that in the peculiar circumstances of the case there was no deviation. I agree, however, with the unanimous judgment of the Court of Appeal that as orders had been duly given to the shipowners’ agents for the third port, the steamer, in proceeding on a course away from that third port, was guilty of a deviation under the charterparty and the Cuban bills of lading. The questions then arise what consequences follow in all the subsequent facts of the case and how they affect the respondents.

Save for an unfortunate accident no one presumably would have troubled about the deviation. But the “Tregenna,” having completed the charterparty cargo at San Pedro de Macoris, stranded in the harbour almost immediately after starting on her homeward voyage. It is not material to consider if there was negligence, but on the other hand it is not possible to say that she would have stranded all the same if there had been no deviation ; the “Tregenna” was so damaged by the casualty that the cargo could not be carried on by her. Heavy general average sacrifices and expenditure were incurred at San Pedro for the salvage of the cargo. The shipowners exercised their right to tranship and forward the cargo by another steamer ; all the cargo that was saved was thus transhipped by the appellants on to the “Baron Dalmeny.” This vessel after arriving at Queenstown proceeded under orders from the respondents, who by that time had become holders of the bills of lading, to Greenock ; there the respondents presented the bills of lading and took delivery of the cargo which had been saved, viz., 2,724 tons of the Cuban cargo and 2,560 tons of the San Pedro cargo. As they had purchased the sugar on “arrived” terms they were not interested in the portion of the cargo which was lost. The appellants, before giving delivery to the respondents, required the respondents to sign a Lloyd’s average bond and make a deposit of £9,500 in respect of the Cuban cargo : this was done. No question arises in these proceedings in respect of the sugar shipped at San Pedro, as regards liability either to contribute in general average or to pay freight. But as already stated both questions come before your Lordships in regard to the Cuban sugar.

I shall first consider the liability to contribute in general average. At the time of the sacrifice and expenditure the property in the Cuban

sugar was in the charterers Farr & Co., who held the bills of lading. As already stated they had sold the sugar to the respondents on "arrived" terms. The charterparty contained only one provision with respect to general average, which was :

general average, if any, to be settled according to York Antwerp Rules, 1924, and where they are not sufficient in accordance with the rules and customs in such matters at the port of destination.

I shall consider first the position apart from the fact that afterwards the bills of lading and the property in the goods were transferred to the respondents. Assuming no deviation, the appellants would have a lien on the goods against the charterers for the general average, and also a personal claim : the lien would be conditional on the goods being eventually saved. The goods owners would be entitled to claim against their underwriters as for a loss by sea perils. If, however, the loss was due to the fault of the shipowner, he could not in the absence of appropriate exceptions claim for the general average loss on the principles stated by LORD DUNEDIN in *Louis Dreyfus v. Tempus Shipping Co.* (1), at p. 734 : I need not repeat what LORD DUNEDIN there said following the classical statement in *Strang, Steel & Co., v. Scott* (2). The explanation why the shipowner cannot claim may be that the maritime law excludes the shipowner's right to claim contribution in such a case, or it may be that, though the right is there, it is liable to be defeated by a cross claim by the goods owner for the same amount as damages ; thus the claim is not maintainable on the principle of avoiding circuity of action ; this also appears to be the effect of rule D of the York Antwerp Rules of 1924. In my opinion deviation is a fault within the principles just stated : the casualty and consequent general average loss must be deemed to have been caused by the deviation since it is impossible to say that the casualty would have occurred if there had been no deviation. In the words of SWINFEN EADY, L.J., in *James Morrison & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd.* (3), at p. 795,

[the shipowners] are quite unable to show that the loss must have occurred in any event, and whether they had deviated or not.

In the present case, if the "Tregenna" had not deviated she would presumably have started earlier on her voyage, and under different conditions of tide, wind, light and so forth. The only liberty to deviate given by the charterparty was "to deviate for the purpose of saving life and property." The deviation was unjustified. But the effect of an unjustifiable deviation such as this on the shipowner's right to claim the benefit of the exceptions contained in the charterparty is too clearly established to require citation of authority : I shall only refer to *Morrison's* case (3) where the loss was due to the King's enemies, and the shipowner was held liable notwithstanding the exception in the

bill of lading, and indeed the exemption generally accorded by law to common carriers. Thus in the present case, if the shipowner, having unjustifiably deviated, were to claim for the general average loss as falling within the contract exception of "perils of the sea, stranding and other accidents of navigation, even when occasioned by negligence," the goods owner would reply that the shipowner had lost the benefit of these exceptions and must bear the loss as due to the fault of himself and his servants, in respect of which he was unprotected by contract. Nor under these circumstances could a lien for general average be asserted. This I understand to be the reasoning upon which SCRUTTON, L.J., based his conclusion that there was no lien for general average in this case. But GREER, L.J., came to the opposite conclusion because he held that the charterers had waived the deviation and could not rely upon it.

Before this House it was in the first instance objected on behalf of the respondents that this issue had not been pleaded and that relevant evidence had not been taken upon it. Your Lordships gave the appellants leave to amend their pleadings and remitted the matter to BRANSON, J., as the commercial judge, to take evidence and make his finding on the issue. He has reported accordingly. He has taken the law from a definition of waiver given by PARKER, J., in *Matthews v. Smallwood* (4), at p. 786 :

Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease.

BRANSON, J., held that this principle, there applied to a lease, must equally apply in the case of any breach of contract by one party thereto which entitles the other to treat the contract as at an end. He then went on to find that the charterers in New York knew of the unjustified deviation at the latest on July 30, 1930 (the day after the "Tregenna" sailed for Queenstown) and also knew that she had been instructed to alter course and proceed to San Pedro and had done so. They might have elected to cancel the charter, but they had sub-chartered the "Tregenna" to the shippers of the San Domingo sugar which the respondents had purchased and did not wish to run the risk of an action by the sub-charterers : they therefore allowed the steamer to proceed to San Pedro and load. BRANSON, J., held on these facts that Farr & Co. had waived in fact and in law any right to rely on the deviation and were not entitled thereafter to treat the contract of affreightment as at an end.

I agree with the conclusion of the Lord Justice. An unjustified deviation is a fundamental breach of a contract of affreightment. Owing to the peculiar nature of a maritime adventure in which shipowner and goods owner are jointly concerned, it is a fundamental condition that in the absence of express liberties, the ship shall proceed by the ordinary and

customary route : any deviation changes the adventure. It has also the serious consequences that it vitiates the goods owner's insurances. This is old law. In the words of FLETCHER MOULTON, L.J., in *Joseph Thorley v. Orchis Steamship Co.* (5), at p. 669 :

The cases shew that, for a long series of years, the courts have held that a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract but something fundamentally different ; and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading.

It is on similar reasoning that a voyage policy of insurance is avoided from the moment that the vessel actually deviates. This loss of the insurance is sometimes stated as the reason why deviation is treated so drastically under a contract of affreightment. If that were all, the mischief might be remedied by means of the deviation clause which is so generally now found in policies. But the reason is more fundamental and is the same in principle in both contracts. The adventure has been changed. A contract entered into on the basis of the original adventure, is inapplicable to the new adventure. I shall later have to consider the effect of a deviation in regard to freight. But however fundamental is the condition, it may still be waived by the goods owner. For this purpose the case is like any other breach of a fundamental condition, which constitutes the repudiation of a contract by one party ; the other party may elect not to treat the repudiation as being final, but to treat the contract as subsisting and to that extent may waive the breach, any right to damages being reserved. One party to a contract cannot end it by his wrongful act against the wish of the other party. In the present case, the charterers elected to waive the breach, with the result that the charterparty was not abrogated, but remained in force. The appellants were thus entitled to the benefit of the contract conditions and in particular to rely on the exception of perils of the sea and thus vindicate any lien for contribution to general average and also enforce the charterers' liability in respect thereof. This would have been the whole position if the charterers had not transferred the bills of lading to the respondents shortly before the cargo arrived at Greenock. The question then arises, what was the effect of the transfer. The personal liability which had attached to the charterers could not be affected, because the cesser clause did not in the fact operate. But was the lien discharged if, as I think, the respondents as bill of lading holders, were entitled to rely on the deviation ? Their position, so far as appears from the evidence, is that they took the bills of lading without notice of the deviation : now it was held in *Leduc v. Ward* (6), that indorsees of bills of lading were not affected by knowledge on the part of the shippers that the ship intended to deviate : the bill of lading holders to whom the property

had passed were held to be entitled to enforce the bill of lading contract according to its terms ; evidence of the shipper's knowledge (which it seems might have as against the shippers amounted to a waiver) was inadmissible. In my opinion that principle applies here. The respondents, as indorsees of the bills of lading, to whom the property passed on the indorsement, were *prima facie* bound by the liabilities resulting from the contract contained in the bill of lading, but were entitled to rely on the deviation which they had not waived ; hence they were relieved from personal liability to contribute to the general average loss. But in my judgment the lien which is the ordinary consequence of a general average sacrifice still attached to the goods though the personal liability remained the liability of the charterers who were owners at the time of the sacrifice. It is difficult, as GREER, L.J., remarks, to see how the lien could be discharged by the transfer of the goods from one person to another. The late JUDGE CARVER in his *CARRIAGE OF GOODS BY SEA*, sect. 443 (I quote from the 4th edition, which was the last prepared by the learned author), dealing with the personal liability, observes that difficulties of this kind seldom occur,

since the person ultimately liable is usually an insurer, on a policy which is transferred with the goods, and since the goods are not generally delivered without a sufficient undertaking.

JUDGE CARVER observes that :

On principle, it is difficult to see how a liability already incurred could be held to be transferred from the vendor to the purchaser, so as to exonerate the former and make the latter liable.

It is not in this case necessary to decide the question of personal liability, but in my opinion the lien was unaffected by the transfer. In any case the appellants, as shipowners, took the course, which is usual, of refusing to deliver without an undertaking from the persons who actually took delivery. This was given in the form of a Lloyd's average bond, dated Oct. 13, 1930, entered into between the respondents as consignees and the appellants as owners of the "Tregenna" ; under the bond the latter agreed to deliver the cargo (which though delivered from the "Baron Dalmeny" was delivered from the possession of the appellants as still held under the original charterparty) in consideration of the former agreeing to pay to the appellants the proper proportion of any salvage, general average or other like charges chargeable on the cargo or to which "the shippers or owners" of the cargo might be liable to contribute in respect of such charges : in accordance with the usual practice a general average deposit was made with trustees, out of which any sums found due on the adjustment of general average was to be made, but the deposit was to be without prejudice and for the purpose only of obtaining delivery of the goods.

It was for the return of this deposit that the action was brought by the respondents; the appellants counterclaimed for a declaration that they were entitled to be paid the proper amount due on adjustment, and also freight.

In my judgment the undertaking in the bond is binding on the respondents: the general average contributions were, as I have explained, chargeable, in my opinion, on the goods, though not personally chargeable against the respondents: the appellants gave up their lien in consideration of the undertaking, and I can see no reason why the respondents should not be bound by the bond. If they discharge a liability which is primarily that of the charterers, they may have a right over. The bond has not been attacked as having been exacted under duress of goods: nor could it have been. It is true that it was without prejudice in the sense that if there had been no lien and no liability in anyone, it might have been unenforceable; that, however, is not the case here. Indeed apart from the lien, I find in the bond a promise to pay general average for which "the shippers or owners" of the consignments might be liable. Though it may be that technically the charterers were not shippers, and were not owners at the date of the bond, though they were owners when the sacrifice and expenditure were incurred, I think they come within the words of the bond and as I have said were liable personally. These bonds are constantly taken from consignees where not only is the actual amount of the lien unascertained but the true incidence of the charge is doubtful; shipowners refuse to give up their lien or deliver the goods without an enforceable undertaking accompanied by security. As JUDGE CARVER points out, it may not matter to the underwriters whether the owner at the time of the casualty or the owner at the port of delivery is the person liable since generally the policy covers either indifferently. In the present case it appears on the documents and was indeed stated that it was the underwriters who were now really concerned.

For these reasons I think the appeal should succeed on this issue and that the appellants should have a declaration that they are entitled to retain out of the deposit the proper contribution in general average chargeable against the Cuban sugar when it has been agreed or ascertained. It is stated that the figure arrived at in the average statement of £8,269 14s. 9d. requires some small correction.

That leaves for consideration the balance of freight on the Cuban sugar delivered, viz., £155 1s. 8d. That figure is arrived at by taking the freight on the quantity delivered, viz., 2,724 tons, which at 13s. 6d. a ton, the charterparty freight, amounted to £1,839 4s. 2d. and deducting from it the whole amount of advance freight paid on 4,990 tons shipped in Cuba, which was £1,684 2s. 6d. The respondents claim that by reason of the deviation they are relieved from liability to pay any freight at all.

Under the charterparty, the balance of freight, that is the 50 per cent.

not payable in advance, was payable in cash at New York upon receipt of cable advice of right delivery of the cargo and the net delivered weight ascertained. Clearly there could be no lien for such freight; but, as the charterers had waived the deviation and the cesser clause was only to operate on payment of all freight, the charterers remained liable. The average bond imposed no new liability on the respondents so far as this freight was concerned. The express term of the bond was that delivery should be made "on payment of the freight payable on delivery, if any." According to the charterparty no freight was payable on delivery; if the bill of lading contracts applied, no freight was payable on delivery under them: they stipulated that all conditions should be as per charterparty and that the consignees should pay freight, as per charterparty. I paraphrase the actual words which differed at the two ports of shipment in Cuba, but whatever they mean, they do not make any freight payable on delivery.

I have discussed the effect of a deviation in so far as it deprives the shipowner of a right to rely on the contractual exceptions, but a deviation carries wider consequences. I think it is right to say that it abrogates the special contract entirely. By "special" here is meant the express contract; it is thereby intended to reserve the question of there being any implied contract. But in particular the deviation destroys, as I think, the right to claim the contract freight, even if the voyage is completed and the goods delivered at the contract destination. It is curious that there is no express decision on this point. It has however been held that a deviation discharges provisions in the contract of affreightment for unloading in a fixed time—*United States Shipping Board v. Bunge y Born* (7). Freight payable at destination under the terms of the contract must be an *a fortiori* case. But the Court of Appeal have denied the appellants' claim to any freight at all on a more fundamental ground: they have held that not only is the contract freight gone, but no freight on a *quantum meruit* can be claimed. SCRUTTON, L.J., states the proposition quite generally:

The fact that a volunteer without authority renders services to another man's property does not give him a right to remuneration, or to keep the property unless he gets remuneration. There is no authority on the question; but as a matter of logic, I think the claim for freight fails.

The "logic" involved is also explained by GREER, L.J., who thinks that after a deviation

the goods are being carried unlawfully: the shipowner is throughout in unauthorised possession of the goods of whoever may turn out to be the owner, and must deliver them up to the owner on demand without payment for a service which neither the shipper nor the owner ever asked him to perform.

During the argument I was of opinion, like your Lordships, that in the circumstances of this case the claim for freight failed. It was accord-

ingly not necessary to hear argument on this important question of principle : it may be reserved for full argument and decision when, if ever, it arises in that simple and abstract form. I merely add a few observations to explain why as at present advised I feel difficulty about it.

I have myself in my own experience never heard of a case where a shipowner who has carried goods to their destination, but after a deviation, has been refused payment of freight. It is different if the goods have been lost after the deviation, as in *Morrison's* case (3), or if they have been delivered at a port other than the agreed destination. But a sweeping general rule such as the Court of Appeal laid down will, if it be correct, have startling consequences. Let me put a quite possible case : A steamer carrying a cargo of frozen meat from Australia to England deviates by calling at a port outside the usual or permitted route : it is only the matter of a few hours extra steaming : no trouble ensues except the trifling delay. The cargo is duly delivered in England at the agreed port. The goods owner has had for all practical purposes the benefit of all that his contract required ; he has had the advantages, of the use of a valuable ship, her crew, fuel, refrigeration and appliances, canal dues, port charges, stevedoring. The shipowner may be technically a wrongdoer in the sense that he has once deviated, but otherwise over a long period he has been performing the exacting and costly duties of a carrier at sea. I cannot help thinking that epithets like "unlawful" and "unauthorised" are not apt to describe such services ; it may be that by the maritime law the relationship of carrier and goods owner still continues despite the deviation, though subject to the modifications consequent on the deviation. Nor can I help feeling that the court would not be slow to infer an obligation when the goods are received at destination to pay, not indeed the contract freight, but a reasonable remuneration. The observations of the Court of Appeal certainly go beyond such authority as there is. In *Joseph Thorley v. Orchis* (5) the shipowners, after a deviation, were held liable for the negligence of stevedores in unloading, notwithstanding the exception in the bill of lading. FLETCHER MOULTON, L.J., said at p. 669 :

In what position, then, does he [the shipowner] stand ? He has carried the goods to their place of destination, and is therefore entitled to some remuneration for that service, of which their owner has received the benefit. The most favourable position which he can claim to occupy is that he has carried the goods as a common carrier for the agreed freight. I do not say that in all circumstances he would be entitled as of right to be treated even as favourably as this, but in the present case the plaintiffs do not contest his right to stand in that position.

I do not think that FLETCHER MOULTON, L.J., intended to lay down here precise rules of law. *Morrison's* case (3) shows that the shipowner, after a deviation, cannot claim the protection afforded by law to a common

carrier, nor can there be any question of the agreed freight if what is called the special contract (as distinguished from any implied contract) is displaced. COLLINS, M.R., at p. 667, says :

It may be, no doubt, that, although that condition [so not to deviate] is broken, the circumstances are such as to give rise to an implied obligation on the part of the cargo owner to pay the shipowner the freight . . . from the fact of the carriage of the cargo to its destination.

I may note that in *United States Shipping Board v. Bunge y Born* (7) the goods owner did not contest the shipowner's right to freight, though the ship had deviated and the terms as to demurrage had gone.

I am not expressing any final opinion because I think the matter does not arise for decision in this case. Here on any view, in my opinion, all the circumstances point against the implication of an agreement to pay a *quantum meruit* freight. By the charterparty, freight was payable by the charterers in New York after delivery : there was no operative cesser clause : it was known to all parties that the charterers were liable throughout for the freight. I can find at this stage no hint that anyone was thinking that the deviation had displaced the contract. The appellants were entitled to freight from the charterers. Under these circumstances the fact that the respondents ordered the ship from the port of call to Greenock and presented the bills of lading and took delivery in the normal way without any mention of freight pointed to the view that freight was no interest of theirs. In fact they had purchased on "arrived" terms and as against their sellers were entitled to delivery "freight free." It is not expressly shown that the appellants were cognisant of the terms of sale, but the terms of the charterparty might be taken to point in that direction and the charterers asked the appellants to send them "released" bills of lading, so as to obtain payment of the purchase price in London. I am not quite clear of the precise effect of the bill of lading terms, which were in effect "paying freight and all conditions as per charterparty," in a case like this, where the charterparty expressly provided for payment in New York, that is, by the charterers at a date after delivery. But it is, I think, sufficiently clear that at the time neither the respondents nor the appellants had any idea of the respondents paying the freight. The appellants were giving up no lien for freight, because they had none. Above all, in the average bond there was an express promise to pay freight, if any, payable on delivery, and I think that this express agreement excludes the possibility of implying an agreement to pay any other freight. It is, in my opinion, clear that no one thought that the bill of lading contract was gone, still less that if it was gone there might be an implied agreement to pay a reasonable freight against delivery. And finally in fact delivery was made so far as the evidence goes as a matter of course without any freight being paid at all.

Your Lordships gave leave to amend so as to include a claim for freight *quantum meruit*. The respondents can be liable for such freight, if at all, only on the ground that an obligation to pay it ought to be implied from all the circumstances. As I think, reserving all more general questions, that on any view no such obligation can here be implied, the claim for freight should, in my opinion, fail and the appeal under that head be dismissed.

LORD MAUGHAM : My Lords, I have had the advantage of studying the opinions which LORD ATKIN and LORD WRIGHT, M.R., have just delivered. I agree with the conclusions at which they have arrived as well as the reasons which have led them to those conclusions ; and I am tempted to add a few observations of my own only because certain questions of great general interest were raised and elaborately argued in this appeal and it may be many years before these questions come again for consideration to this House.

My Lords, the first question to which I wish to refer may be stated thus : what is the effect of a deviation on the contract of carriage by sea contained in a voyage charterparty ? In particular, is the effect the same as if a fundamental condition of the contract had been broken by the shipowner so that the charterers become entitled to accept the repudiation and to treat the contract as at an end as from the date of the repudiation, or is the effect, as Sir Robert Aske argued, that the charterparty remains binding except to this extent that the shipowner is not entitled to rely on the exceptions clause in the charterparty ? My Lords, for my part, after a careful consideration of the authorities I find it easy to agree with the view expressed by both the noble Lords on this point, for I am unable to see any justification in the law of contracts, or anything peculiar in a maritime adventure which could lead to the conclusion that the shipowner was bound to continue to carry for the charterers but on terms to which he had never agreed. The contract not being severable it seems to me that the charterer must when he knows of the deviation either accept the repudiation by conduct arising from it, in which case the parties are left to rely on the implied contract, if any, which may arise from the circumstances, or to treat the contract as in force, in which case he could only claim any damage proved to have been caused to him by the deviation.

In the second place I will observe that, holding this view as to the consequences in law of a deviation, the conclusion is inevitable that the party who had a right to complain of the deviation may elect to treat the contract as subsisting. This, as I think, makes it necessary to qualify some remarks which fell from GREER, L.J., in delivering the judgment with the substance of which I am in agreement. The Lord Justice observed that after a deviation the goods are being carried unlawfully,

and the shipowner is in unauthorised possession of them. With the greatest respect I do not agree. My Lords, the breach of a condition contained in a contract of carriage by sea, even so fundamental a condition as that the ship in the absence of express provision shall proceed by the ordinary and customary route does not of itself, that is, without an acceptance of the repudiation by the charterer or other party concerned, abrogate the contract. The shipowner is therefore not a wrongdoer in the normal case if after a deviation the master continues (in the absence of a special direction from the owner of the goods) to carry the goods according to the charterparty to the port of destination. The position that arises in such circumstances is plainly one that may give rise to many difficulties ; but in my opinion they are certainly not so serious as those which are involved in the view that the shipowner is a wrongdoer in continuing to carry the goods to the agreed port.

On the question of waiver, a word which means in the present connection an election by the charterers to treat the charterparty as subsisting, I will only add one remark to what LORD ATKIN and LORD WRIGHT, M.R., have said. If the effect of a deviation was merely that for which Sir Robert Aske contended there would be much more difficulty in holding that there had been a waiver, for it would be almost impossible to give any satisfactory reason why the charterers should elect to give up the right, if they had it, to hold the shipowner to the terms of the charterparty omitting therefrom the exceptions which were inserted for his protection. On the other hand—accepting the view that the charterers with knowledge of the facts as regards deviation and its consequences are not entitled to approbate and reprobate, and that an unequivocal act recognising the continuance of the contract of affreightment makes it impossible for them subsequently to treat the contract as at an end by reason of the deviation—the conclusion as to waiver is inevitable upon the facts as found by BRANSON, J., and in accordance also with the view of GREER, L.J.

As regards the lien on the goods in consequence of the general average sacrifice, a right resting not on the charterparty but on the general maritime law, I will express my opinion in agreement with what has fallen from LORD WRIGHT, M.R., that the lien was unaffected by the transfer to the respondents as bill of lading holders. The true construction of the Lloyd's average bond dated Oct. 13, 1930, on this view does not seem to me to present any serious difficulty ; for I think that the shipowners gave up this lien and permitted an immediate delivery of the goods subject to it in consideration of the agreement by the respondents to pay the proper proportion of any general average chargeable on the cargo or to which the shippers or owners of the cargo might be liable to contribute. It seems to me reasonably clear that the respondents are in these circumstances not entitled to the return of

the deposit so far as it related to the proper general average contribution.

Finally, on the general question whether a consignee is liable to pay freight after a deviation which has been treated as putting an end to the contract of affreightment I would only observe that that question does not now arise for decision; but I am strongly inclined to doubt the correctness of the view suggested in the Court of Appeal. As I have already indicated, I do not agree with the proposition that the ship-owner (apart from any step taken by the consignee) ought to be regarded as a volunteer or a wrongdoer, and I am of opinion that a claim on the footing of *quantum meruit* must depend on all the circumstances of the case, including the question whether the goods have been delivered at the agreed port and without injury or substantial delay. Bearing in mind a well-known adage and your Lordships' abstention from expressing any final opinion on this matter I do not propose to express any further view of my own on it. In the present case the claim for freight on the basis of *quantum meruit* is excluded by the fact that the freight by the terms of the charterparty was payable by the charterers in New York after delivery at Greenock. There was therefore no lien for freight and nothing in the Lloyd's average bond to make the respondents liable to pay it.

Appeal allowed with modified costs.

Solicitors: *Botterell & Roche* (for the appellants); *Middleton, Lewis & Clarke* (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

BILSLAND v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), May 28, 1936.]

Income Tax—Sales cum dividend—Avoidance of sur-tax—Apportionment—“Exceptional and not systematic” avoidance—Finance Act, 1927 (c. 10), s. 33 (3), (4).

The appellant sold certain shares admittedly to avoid the payment of sur-tax, the arrangement being that certain dividends about to be declared at the time of the sale should be transferred to the vendor as consideration for the purchase. The assessments were made upon the appellant upon the ground that by virtue of Finance Act, 1927, s. 33, the dividends of the shares must be deemed to be accruing from day to day and that this was not an exceptional case within the proviso to subsect. (4) of that section:—

HELD: (i) the dividends must be deemed to accrue from day to day and upon that ground the appellant could be assessed with an apportioned part thereof.

(ii) this was, however, an exceptional and not a systematic avoidance of tax, and the assessment must be discharged.

[EDITORIAL NOTE. This case turns upon the construction of the Finance Act, 1927, s. 33, dealing with the avoidance of the payment of sur-tax by sales cum dividend. The construction of subsect. (3) is very shortly dealt with, and the main discussion is upon the proviso to subsect. (4), particularly as to what is, on the one

hand, a systematic, or, on the other hand, an exceptional avoidance under the proviso. It was suggested by the Crown that any "planned" avoidance was systematic, but this contention was rejected and the view expressed that one avoidance cannot be systematic.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, p. 283, para. 561; and FOR THE SECTION, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 688.]

CASE STATED under Finance Act, 1927, ss. 36 (2) and 42 (7) and the Income Tax Act, 1918, ss. 7 (6) and 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

An additional assessment for sur-tax was made upon the appellant on the basis that he was the holder of shares in a certain company. On Mar. 20, 1933, the appellant had sold these shares admittedly to avoid payment of sur-tax. On Mar. 28, 1933, and Apr. 30, 1933, dividends amounting to £75 per share were declared, and in nearly every case the transferee of shares endorsed the dividend warrant over to the appellant in payment for the shares. It was contended for the Crown that the appellant was beneficially entitled to the dividends and therefore chargeable to sur-tax for the year 1932/33 in respect of the dividend declared on Mar. 28, 1933; that alternatively the shares were assets to which the Finance Act, 1927, s. 33, applied.

The Finance Act, 1927, s. 33, provides as follows :

33. (1) Any individual upon whom notice is served by the special commissioners requiring him to furnish a statement of and particulars relating to any assets in which, at any time during the period specified in the notice, he has had any beneficial interest, and in respect of which, within such period, either no income was received by him, or the income received by him was less than the sum to which the income would have amounted, if the income from such assets had accrued from day to day and been apportioned accordingly, shall, whether an assessment to super-tax in respect of his total income has or has not been made for the relevant year or years of assessment, furnish such a statement and such particulars in the form and within the time (not being less than twenty-eight days) required by the notice.

(3) If it appears to the special commissioners by reference to all the circumstances in relation to the assets of any such individual (including circumstances with respect to sales, purchases, dealings, contracts, arrangements, transfers, or any other transactions relating to such assets) that the individual has thereby avoided or would avoid more than ten per cent. of the amount of the super-tax for any year which would have been payable in his case if the income from those assets had been deemed to accrue from day to day and had been apportioned accordingly and the income so deemed to have been apportioned to him had been treated as part of his total income from all sources for the purposes of super-tax, then those assets shall be deemed to be assets to which subsect. (4) of this section applies.

(4) For the purposes of assessment to super-tax in the case of any such individual, the income from any assets to which this subsection applies shall be deemed to accrue from day to day, and in the case of the sale or transfer of any such assets by or to him shall be deemed to have been received as and when it is deemed to have

accrued : provided that an individual shall not be liable to be assessed to super-tax under this section in respect of any such income if he proves to the satisfaction of the special commissioners that the avoidance of super-tax was exceptional and not systematic, and that there was not in his case in any of the three next preceding years any such avoidance of super-tax as is described in the provisions of the last preceding subsection.

The commissioners found that the appellant had not proved that the avoidance of sur-tax was exceptional and not systematic and therefore the income from the said shares must be deemed to have accrued from day to day and to have been apportioned to the appellant accordingly and so apportioned formed part of his total income for the purposes of assessment to sur-tax.

A. M. Latter, K.C., H. P. Glover, K.C., and F. Heyworth Talbot for the appellant.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondents.

LAWRENCE, J. : There are two points in this case : (a) whether the shares sold by the appellant in the circumstances detailed in the case are assets to which the Finance Act, 1927, s. 33 (3), (4), apply, and (b) whether the proviso to subsect. (4) of that section protects the appellant from liability to super-tax on the income which he is deemed to have received from those assets. On the first point it is contended for the appellant that the words of the subsection are inapt to cover the present case because if the income from the assets had accrued from day to day the appellant could not by selling the assets have avoided the tax. In my opinion this argument is unsound. It omits the words "deemed to" and makes the subsection practically meaningless. Of course, if the words are meaningless the taxpayer would not be taxable, but in my opinion the words, though clumsy, have a meaning. The words "if the income had been deemed to accrue" are, in my view, introduced solely for the purpose of defining the amount of super-tax which the taxpayer must have avoided in order to bring the assets in question into charge. The words "super-tax which would have been payable if the income had been deemed to accrue" indicate that it was not so payable, and therefore relate the fact of avoidance to the notional accrual for the purpose of measuring the necessary amount of avoidance. I am, however, of opinion that the appellant is entitled to succeed on the second point. In my opinion, the words "exceptional and not systematic," in subsect. (4), have relation primarily to number. To read the word "systematic" as meaning "planned" or "devised," as was contended for the Crown, appears to me to be impossible in the context. The more planned or devised the avoidance is, the more exceptional it is. Moreover, "exceptional" means, in my view, taken out of something ; it cannot mean taken out of the ordinary rule ; it must mean in this con-

text taken out of the system, and that implies that there must be more than one instance in the system. It seems to me impossible to say fairly that a single avoidance of tax is systematic and not exceptional. It was also, I think, faintly argued that the avoidance was not exceptional because it was carried out by a number of sales at the same time; but in my opinion this did not prevent the avoidance of the super-tax for that one year being exceptional. In my opinion, the taxpayer has to prove that the admitted avoidance is exceptional and not systematic; that is to say, not part of a system of avoidances, and he must go further and prove that there has been no such avoidance within the last three years. I am therefore of opinion that there was no evidence upon which the commissioners could find that the avoidance in this case was not exceptional, and the appeal must be allowed with costs.

Solicitors: *Blundell, Baker & Co.*, agents for *Snowball, Kyffin Taylor & Pruddah*, Liverpool (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by LESLIE CARNEGIE, Esq., Barrister-at-Law.]

HEARTS OF OAK BUILDING SOCIETY v. LAW UNION AND ROCK INSURANCE COMPANY, LIMITED.

[KING'S BENCH DIVISION (Goddard, J.), May 28, 1936.]

Insurance—Policy of fidelity guarantee—Application—Answers to questions as to duties of person proposed—Whether warranties.

In an application for a policy of fidelity guarantee to be issued by the respondents in respect of a solicitor employed by the claimants to receive mortgage moneys, the claimants in reply to certain questions stated, *inter alia*, that the solicitor was required to send daily statements of cash received and to pay over such cash to the claimants as soon as it was received. Before the policy was renewed the claimants discovered that the solicitor was not in fact handing over money as soon as it was received, but this fact was not communicated to the respondents, and the policy was duly renewed. The claimants suffered loss through the acts or defaults of the solicitor, and they claimed indemnity under the policy. The respondents denied liability, alleging that the answers to the questions in the application were warranties and made the basis of the contract, and that by a condition in the policy it was rendered void by wrong answers to such questions:—

HELD: the answers to the questions were merely statements of fact as to the duties of the solicitor and were not warranties that such duties would be strictly performed. There was no proof that before the renewal the claimants were aware of dereliction of duty by the solicitor, though they may have known that the duties had not been strictly performed, and they were entitled to recover.

[EDITORIAL NOTE.] Conditions which are made the basis of a contract of insurance have not been previously considered in relation to fidelity insurance. The observance of matters of routine and precautions against dishonesty is very essential in such insurance and any departure therefrom might mean a very

material alteration of the risk. At the same time, any claim under the policy is likely to arise from non-observance of these matters by the employee and it is only variations in such matters purposely made by the employers or acquiesced in by them that are breaches of a condition to enforce such rules. And this is so even though there is a condition that such rules shall be observed and that condition is made the basis of the contract.

AS TO ALTERATION OF RISK IN FIDELITY INSURANCE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 508, 509, para. 789, and FOR CASES see DIGEST, Vol. 29, p. 411, Nos. 3233, 3234.]

Case referred to :—

(1) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413 ; 29 Digest 309, 2553.

CASE STATED by F. P. M. Schiller, Esq., K.C., in an arbitration.

The respondents issued a policy of fidelity guarantee insurance to the claimants in respect of the periods Apr. 25, 1932, to Apr. 24, 1933, and Apr. 25, 1933, to Apr. 24, 1934. M. was one of the servants of the applicants, whose fidelity was insured by the policy, and the respondents guaranteed loss up to £10,000 in respect of his defaults. When applying for the policy in 1932, the claimants, by their secretary, gave the following answers to questions :

How often are they (i.e., persons proposed) required to send statements of cash received ?—Daily.

How often do you require them to pay over to you and are they then allowed to retain a balance in hand ? If so, how much ? And do you see that they have the amount in their possession ?—M. should not retain and should pay over as received.

M. had previously been proposed by the claimants in 1925, and then the following answers had been given to the questions :

In what way will money reach his hands ?—Cheques for mortgage advances and cash on redemption.

How often is he required to pay over amounts received by him on behalf of the employer, and what are the regulations attached thereto ?—Day following in case of redemptions.

Is he then allowed to retain a balance in hand ? If so, how much ? Is it then seen that he has that amount in his possession ?—No.

Condition (1) of the policy provided :

This policy is entered into . . . on the distinct understanding that the business of the employer shall continue to be conducted, and the remuneration (except by way of increase thereof) and the duties of the employed, the moneys to be entrusted to them, and the checks to be kept upon their accounts shall remain in every particular in accordance with the questions and replies referred to within, and if during the continuance of this policy any circumstances shall occur or change be made which shall have the effect of making the actual facts differ from the statements contained or implied in such questions or replies, or any of them, without notice thereof being given to the company, and the consent or approval in writing of the company being obtained, or if any suppression or misstatement of any fact affecting the risk of the company be made at any time, or if the employer

should continue any of the employed in his service after having discovered any act of fraud or dishonesty on his or their part, this policy shall be void and all the premiums thereon paid to the company forfeited.

By the acts and defaults of M. the claimants suffered loss of £6,731 7s. 6d., which sum they claimed from the respondents.

The respondents denied liability and before the learned arbitrator alleged that the answers given by the claimants were untrue and the warranty broken in that (1) the said M. had at no time since his appointment been required to furnish the applicants with daily statements of cash received, and (2) the said M. was not at the time of the making of the said proposal or at any time thereafter required to furnish the claimants with daily statements of cash received, and (3) the said M. never furnished the claimants with statements of cash received either prior to or subsequent to the making of the said proposal. The respondents further alleged that the said claimants concealed the fact that M. at no times furnished to the claimants any daily statements; also that the claimants took no steps to check whether or not M. was retaining money received by him; also that the loss had been aggravated by the claimants failing to enforce their own rules. In fact, the secretary of the claimants discovered that M. was not handing over the money as soon as received, and this was discovered before the policy was renewed.

The learned arbitrator held that the answers to the questions were not warranties but representations only of the duties of M., and were in fact truly represented how it was expected M. would carry out his duties, and that condition (1) of the policy, therefore, was not applicable to the circumstances of the case. He awarded the claimants £6,731 7s. 6d., if he had come to a right conclusion in law.

H. D. Samuels, K.C., and Philip Vos, for the respondents.

Roland G. Oliver, K.C., and Tristram Beresford, K.C., for the claimants.

GODDARD, J. : This is a special case stated by an arbitrator in an arbitration between the Hearts of Oak Permanent Building Society and the Law Union and Rock Insurance Company, Limited, arising out of a claim on what is called a fidelity guarantee policy. The learned arbitrator has set out at considerable length in his award the points of claim and points of defence that were relied upon; he has also set out the contentions, and he has set out the findings of fact with, if I may say so commendable clarity.

It appears that the assured desired to insure a man who was in their employment as a solicitor, a man of the name of McMurdy. They had already insured him under a policy which was taken out in the year 1925. There was a subsequent policy taken out in Apr., 1932, and it was under that policy that the claim was made. Reference appears

to have been made in the arbitration to some questions and answers which came into existence when the 1925 policy was taken out. At present I do not understand the materiality of them, because, although they dealt with the same servant, they are not incorporated in this policy, and the questions and answers which seem to me material to this policy are the questions and answers which came into existence in Apr., 1932. I do not think, however, that it makes very much difference in the answers. In the Apr., 1932, policy the questions that were asked were these: "How often are they"—that is the various people who included McMurdy—"required to send statements of cash received?" The answer with regard to McMurdy was "Daily." Another question was: "How often do you require"—we will say "him"—"to pay over to you and is he allowed to retain a balance in hand? If so, how much? And do you see that they have the amount in their possession?" The answer which the intending assured made to that question was: "McMurdy should not retain and should pay over as received." Those questions are to be found as sub-questions, one may put it, to para. (2) on the question form, which question starts: "With respect to the duties of the officers, please reply as fully as possible to the following questions." It is therefore quite obvious that a question is being put to the employer as to the duty of the officer, and the answer which the employer makes is an answer telling the intended insurers what are the duties of the officer. Therefore they inform the company that the duty of McMurdy is not to retain the money, but to pay it over as received, and that he is required to send statements of cash received daily. That is his duty.

The arbitrator has found that, so far as those are statements of fact, they are perfectly true—that those were the duties of the man. If any importance attaches to the 1925 answers—though I cannot myself see that any does—the arbitrator does refer to them in the case, but he does not say whether in his opinion any importance attached to them at all—again, they are answers with regard to the duties of the servants of the company. The questions commence in this way: "With respect to the duties of the applicant, please reply as fully as possible to the following questions." Then (b) is: "In what way will money reach his hands?" This also appears in the later one. The answer is: "Cheques for mortgage advances and cash on redemptions." Then (f) is: "How often is he required to pay over amounts received by him on behalf of his employer, and what are the regulations attaching thereto?" Answer: "Day following in case of redemptions." Those, I think, are the only questions which the learned arbitrator sets out in his case.

The learned arbitrator goes on to find that, so far as the company was concerned, that went on until Apr., 1933, and that about the middle of April of that year (and, therefore, I think, it is a fair assumption to make that it was before the policy was renewed, because it was not

renewed until Apr. 25) it had come to the knowledge of the secretary of the company that in some instances McMurdy had not handed over money as soon as it was received. It did not raise any suspicion in his mind at that time. McMurdy was a trusted servant of the company. McMurdy's duties certainly had never been varied. It remained his duty. It was as much his duty in Apr., 1933, as in Apr., 1932, and as it had been since McMurdy became solicitor to the company, which was some eight years previously. It was as much his duty in the latter part as in the earlier part to account daily to the company and not to retain moneys in his hands. Of course, the company could not know whether he did actually get money on any particular day, and it is because they do not know exactly when he gets money and they do not know whether he does hand over or is going to hand over the exact sums that he receives, that they wished to insure against his possible defalcations. If he did hand over the money every day as he received it or the day after he had received it, there would be no defalcation and nothing to insure against. It seems, therefore, that before there was a renewal of the policy, the secretary did know, not that a fraud had been committed, but that in some instances this man had not handed over money with the promptitude with which it was his duty to act.

The first argument of Mr. Samuels is that the answers to these questions, forming as they do the basis of the contract, are what have often been called warranties or conditions precedent to the liability. He says that they have been broken and that, therefore, the company is freed from liability.

The first thing to observe is that in the view of the learned arbitrator, with which I entirely agree, these statements are statements made as to what is the duty; that is to say, what are the requirements of the company in the sense of what they have impliedly, if not expressly, told their servant to do. It is setting out, in other words, the terms of the employment, so far as this matter is concerned, between themselves and McMurdy. The learned arbitrator finds that it was the duty of McMurdy to act in the way that the claimants in their answers say that it was. Therefore, it would not appear to me that there could be any question of that warranty being untrue or in any sense of the word broken.

Mr. Samuels argues—as I understand his argument and I hope I have followed it properly—that these clauses are what have been called in the House of Lords promissory, by which is meant that they contain a promise by the assured that a particular state of affairs will continue. In the case to which my attention has been called, *Dawsons, Ltd. v. Bonnin* (1), a wholly different state of affairs is found. That was a case where somebody was employing a motor lorry, and, being asked where the motor lorry would be usually garaged, they said that it would usually

be garaged at such and such a place, where in fact it never was, or certainly not usually. The House of Lords in that case held on the construction of that document that there was not only a promise or undertaking that it was usually garaged in the place at the time that the answer was made, but an undertaking that it would be so garaged during the period of the policy. As it was not garaged at that place during the currency of the policy, the underwriters were under no liability. It may be put in another way. It was a promise to garage the lorry at a certain place, and the contract of insurance applied as long as it was garaged at that certain place and not as long as it was garaged anywhere else.

In this case it seems to me that it is quite impossible, especially when one remembers that this is a fidelity guarantee policy, to construe these undertakings as a promise that during the currency of the policy McMurdy would faithfully carry out his duties, which is what the argument comes to, because that is the very thing against which insurance is being taken out, and it cannot be said that this is a promise that McMurdy would never retain and would always pay over the money as received and that he would always send statements of cash in daily, because, of course, if McMurdy always did that and the claimants could always say that he did that, there would be no point at all in insurance. I think these questions are merely directed to finding out what was the system in force in the respondents' office, so that the insurers could see whether the respondents' office system was such that they would accept the risk. So far as that part of the case is concerned, I have no doubt whatever.

There is also in the policy a condition, and the condition is this: [His Lordship read condition (1) set out above.] The point which I think was raised in the pleadings, and the point which was contested before the arbitrator, as appears from his statements about the contentions, was this: it was said that the actual facts differed from the statements in the questions and answers, because McMurdy had not in fact been accounting daily, and had not in fact been handing over the money the day after it was received, and it was said: "You knew he had not done it."

In my judgment that is not the meaning of this condition at all as applied to this case. I think it means this: if a change occurs which shows that these answers are inaccurate (in other words, that there has been a change in the duties of McMurdy, so that it was no longer his duty to account daily or hand over the money the day after it was received, and that he had been told that, instead of doing that, he was to do it monthly, quarterly, or something of that sort) the company are to be informed, because it might well be that they would not be willing to write the risk any longer: they would say that that was not a satisfactory check. That, I think, is the first thing to which the condition

applies. It also applies, as appears from the words which I have just read, to a suppression or misstatement. If there has been a suppression or misstatement, we all know that that would avoid a policy of insurance. More than that, it may well be, and indeed, there can be no doubt that if some material fact comes to the knowledge of the assured during the currency of the policy, which lasts for a year but which it is contemplated may be renewed, which fact it would be material to communicate to the insurers when applying for a renewal, it is the duty of the assured to communicate that fact to the company, and, if the assured does not, there is a concealment which may avoid the renewed policy—it would not avoid the old policy.

I think that the most favourable way in which this case could be put for the insurance company would be this. It is said : some days before you renewed this policy (the exact number of days does not appear, nor does it much matter), or before you asked us to renew your policy for another year, you knew that McMurdy had not in some cases, at any rate, done that which it was his duty to do, namely, handed over the money punctually. I cannot find that it was raised in the pleadings that that fact, having come to the knowledge of the claimants, they ought to have communicated it. It was put throughout, as I think, taking what was a wrong view as to what these answers were, that, as he had not in fact carried out his duties, the statement as to what his duties were was wrong. The arbitrator was never asked, as far as I can discover—it certainly appears nowhere in the case, and it nowhere appears from the pleadings—to consider whether or not there was a non-disclosure of a material fact on the renewal of the policy. I think that Mr. Roland Oliver is entitled to say that that point cannot be raised now. It cannot be raised now because it is not one of the questions raised in the case, in the first instance, and it is too late to raise it now, because, as I ventured to point out at some time quite early in the argument, it would then have led to an investigation as to which of these losses were incurred while the original policy, that is to say, the policy effected in Apr., 1932, was in force, and which had occurred when the renewed policy was in force. Not only that, but the learned arbitrator would have had to apply his mind to the question as to whether what the secretary in fact found out in Apr., 1933, was material to be disclosed. A man can only disclose that which he knows. I am far from saying that, because some departure from a man's strict duty has been discovered, that would avoid the policy if the insurer was not informed about it. The number of perfect employees or perfect servants in this world is necessarily very few. I say "necessarily" because one has to make allowance for the defects of human nature. It seems to me that it would be a very extraordinary thing to find during the whole of the year that a man had never departed from the strict letter of his

duties. There may be people who never depart by a hair's breadth from them. Most people do, I think, at some time depart from them by momentary carelessness or momentary forgetfulness. It may be that what the secretary knew at the time that he renewed this policy was that there had been some departure by McMurdy from the strict letter of his instructions, and I think it is clear that the learned arbitrator did not think and did not find that it was ever apparent to the mind of the secretary that there had been any serious dereliction on the part of McMurdy until a considerably later date. However that may be, that point does not seem to me to be raised in the pleadings, and it does not seem to me ever to have been argued or taken before the arbitrator. At any rate, there is no finding of the arbitrator, and there is no statement of that as being one of the contentions.

The consequence is, for the reasons which I have endeavoured to give, that in my opinion the award of the arbitrator was right. I confirm the award in favour of the Hearts of Oak Building Society, who will have the costs of the argument.

Solicitors: *Wontner & Sons* (for the claimants); *William Charles Crocker* (for the respondents).

Reported by H. P. LANSDALE-RUTHVEN, ESQ., Barrister-at-Law.

Re JEFFERIES, FINCH *v.* MARTIN.

[CHANCERY DIVISION (Clauson, J.), **May 19, 20, 1936.**]

Perpetuities—Accumulations—Accumulation of excess income during life of annuitant—Residue to be given to charities—Charities to be selected after death of annuitant by then trustees—Destination of excess income accruing after twenty-one years from testator's death—Accumulations Act, 1800 (c. 98)—Law of Property Act, 1925 (c. 20), s. 164.

A testator by his will gave to his trustees his real and personal estate, not otherwise disposed of, in trust out of the income thereof to pay to M. during his life a certain annual sum, and he declared that his trustees should stand possessed of his real and personal estate from and after the death of M. "upon trust to sell the same and to stand possessed of the net proceeds thereof and the balance of the income accumulated during the lifetime of [M.] and the interest thereof in trust to divide the same amongst such of the London hospitals situate within the administrative County of London as my trustees for the time being shall in their absolute discretion select and to be paid to or for such hospitals in such proportions as my trustees for the time being may think proper." Upon a summons to determine the effect of the gift of residue, it was sought to show that upon the testator's death there was an immediate vested gift to charity, postponed as to time of payment, and that the Attorney-General could stop the accumulations:—

HELD: there was no interest vested in anybody, the gift being to a class of institutions to be ascertained in the future, and the direction in the will for accumulation of the income in excess of that required for meeting the annuity to M. became void twenty-one years after the testator's death. There was an intestacy as regards excess income

accruing after the expiration of the period of twenty-one years from the testator's death until the death of M.

[EDITORIAL NOTE.] The direction to accumulate here was certainly good for twenty-one years. The residuary legatees could only claim the accumulations after that date if they could show that their interests were vested. In order to show this it was argued that the residuary gift was a gift to "charity" and was vested in "charity" though the particular charities to benefit might not be determinable until some future time. The decision is that there is no such entity as "charity" in which a gift can be vested. The gifts were, therefore, not vested gifts and there was an intestacy as to the income after the limit of accumulation had been reached.

AS TO EFFECT OF INVALIDITY OF TRUST FOR ACCUMULATION, see HALSBURY, 1st Edn., Vol. 22, Perpetuities, pp. 381, 382, paras. 777-779, and FOR CASES, see DIGEST, Vol. 37, pp. 147-151, Nos. 727-761.]

Cases referred to :—

- (1) *Saunders v. Vautier* (1841), Cr. & Ph. 240 ; 44 Digest 1090, 9406.
- (2) *Wharton v. Masterman*, [1895] A.C. 186 ; 37 Digest 146, 721.
- (3) *Harbin v. Masterman* (1871), L.R. 12 Eq. 559 ; Digest Supp.
- (4) *Re Platt, Sykes v. Dawson*, [1916] 2 Ch. 563 ; 39 Digest 153, 457.
- (5) *Re Deloitte, Griffiths v. Deloitte*, [1926] Ch. 56 ; 37 Digest 149, 752.
- (6) *Re Knapp, Spreckley v. A.-G.*, [1929] 1 Ch. 341 ; Digest Supp.
- (7) *Re Cardwell, A.-G. v. Day*, [1912] 1 Ch. 779 ; 8 Digest 413, 2532.
- (8) *Re King, Jackson v. A.-G.*, [1917] 2 Ch. 420 ; 8 Digest 401, 2301.

ADJOURNED SUMMONS.

The main point arising for decision out of the summons, as amended, in this case, was whether the rule against accumulation of income, contained in the Accumulations Act, 1800 (now replaced by the Law of Property Act, 1925, s. 164) was applicable to a gift to certain charities contained in the will of E. W. Jefferies, deceased, or whether the rule in *Wharton v. Masterman* (2) applied, the rule being that, where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no person has an interest but the legatee.

The testator appointed one George Alfred Martin and the two plaintiffs in the present summons, to be the executors and trustees of his will, the material parts of which were as follows :

I give and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees . . . in trust out of the income thereof to pay to the said George Alfred Martin during his life the annual sum of £300 subject to his paying thereout all sums necessary for keeping my properties in good substantial repair and condition and insured and to his paying all rates and taxes and deductions in respect of such properties not payable by the tenants thereof and I declare that my trustees shall stand possessed of my real and personal estate from and after the death of the said George Alfred Martin upon trust to sell the same and to stand possessed of the net proceeds thereof and the balance of the income accumulated during the lifetime of the said George Alfred Martin and the interest thereof in trust to divide the same amongst such of the London hospitals situate within the administrative County of London as my trustees for the time being shall in their absolute discretion select

and to be paid to or for such hospitals in such proportions as my trustees for the time being may think proper. . . . I also authorise my trustees at any time or times with the consent in writing of the said George Alfred Martin during his life should in their discretion it be found expedient so to do to sell the whole or any part or parts of my said real and leasehold property and to stand possessed of the net proceeds of any such sale upon the trusts subject to the powers and provisions herein declared and contained of and concerning the net proceeds of the sale of my residuary real and personal estate after the death of the said George Alfred Martin.

By a fifth codicil the testator provided as follows :

I hereby revoke the previously mentioned gift of £300 per annum to George Alfred Martin from which the costs of the maintenance and upkeep of my property was to have been paid and now decide that George Alfred Martin have from the estate the sum of £150 on condition that he properly attends to the letting of my property in agreement with and to the entire satisfaction of the other trustees and collects the rents free from commission and that he also consults them as to all repairs and their agreement as to the cost of the same is to be considered of vital importance. Should he fail to show interest in the letting and collection of the rents of my property and the remaining trustees decide that in the interest of my estate this work had better be placed in the hands of another he shall then receive a reduced sum of £100 per annum for the term of his natural life my wish being that in the management of my property Mr. George Alfred Martin shall find an occupation but that in all matters whatsoever he shall work entirely in agreement with his co-trustees.

The testator died on June 15, 1912, so that the period of twenty-one years from his death expired on June 15, 1933, and, if the rule in *Wharton v. Masterman* (2) did not apply, there would be an intestacy as from that date, until the death of George Alfred Martin, and the testator's next-of-kin would be entitled to accumulations of income during the above-mentioned period as against the charitable institutions amongst whom the ultimate residue was to be divided.

The summons also asked questions as to the application of the proceeds of the sales, and accumulations of the income from such proceeds of sale of the parts of the testator's real and leasehold property as were sold (a) before 1926, (b) between Dec. 31, 1925, and June 16, 1933, and which might be sold after the date of the summons and as to whether the annuity payable to George Alfred Martin was payable wholly out of the income of the testator's personal estate or partly out of the said rents and profits and partly out of the said income.

G. A. Rink, for the plaintiffs, the two executors and trustees of the will other than George Alfred Martin, stated the facts.

J. A. Reid, for the first defendant, George Alfred Martin.

E. M. Winterbotham, for the next-of-kin of the testator : A direction to accumulate for more than twenty-one years after the death of a testator is void, and income arising from the personal estate or from accumulations of income from personal estate after the expiration of the twenty-one years goes to the next-of-kin as being undisposed of by

the will. The only question is whether there is anyone who can terminate the trust to accumulate for a longer period than twenty-one years, and on the proper construction of this will there is not, at the present moment, anyone or any particular charity, who can say: "I am absolutely entitled and I want to put an end to this trust for accumulation and take the fund." It is not a case of a vested gift to individuals. The charities which are to take are to be selected after the death of Mr. Martin and that distinguishes this case from *Saunders v. Vautier* (1). If there is any contingency about a gift, even all the persons entitled cannot put an end to the trust to accumulate. The selection of the hospitals entitled has to be made by the trustees for the time being of the will at a future time, and there is no power now to select the hospitals who are to take. Apart from the fact that the trustees may not exercise the discretion in advance, they may not be the right persons to exercise it when the time comes, as they may no longer be the trustees of the will. See *Harbin v. Masterman* (3). It is not enough to say that the fund is given on general charitable trusts.

M. J. L. Beebee, for the trustee in bankruptcy of one of the next-of-kin, adopted *Winterbotham's* argument.

Wilfrid M. Hunt, for the personal representatives of one of the heirs in gavelkind of the testator: I am in the same interest as the next-of-kin. The first thing to do is to construe the will apart from the Accumulations Act. It is clear that the testator intended accumulations of income beyond the amount required for the annuity during the whole of the annuitant's life, and there is no one now who can stop the accumulations. There may be hospitals which will come into existence in the future and which may get all the money. The fund does not arise until after Martin's death.

Wharton v. Masterman (2) is an exception to the rule that, if there are accumulations beyond twenty-one years, *prima facie* there is an intestacy, and unless you can spell out from the will that there is someone who can stop the accumulations, there is a gap. Moreover *Wharton v. Masterman* (2) does not apply if the annuitant can have recourse to the accumulations. That that is the case here is shown by the words: "I now decide that George Alfred Martin shall have *from the estate* £150." Those words would include not only original estate but also accumulations if there was not sufficient to pay the annuity. If, in fact, the annuity is charged on accumulations the result is that the charities are not the only persons entitled to them.

A. Andrewes-Uthwatt, for the Attorney-General: (i) There is an absolute indefeasible gift to charity, subject only to the annuity, which I say is charged on income only and not on the accumulations. I doubt whether there is any direction to accumulate at all, but in any event the annuitant has no interest in past accumulations: see *Re Platt, Sykes*

v. *Dawson* (4), and *Re Deloitte, Griffiths v. Deloitte* (5). (ii) It is a fallacy to argue that the power of selection is of the essence of the gift. That is not so. There is, immediately the testator dies, a vested gift to charity. That being so, the question whether the accumulation provision shall be carried out is merely a question of how to administer the charity property. There is no essential difference between this case and (a) the unincorporated charity in *Wharton v. Masterman* (2), except that there is here no person beneficially interested who can be said to be a direct legatee, but that is immaterial; and (b) the "charitable trust" in *Re Knapp, Spreckley v. A.-G.* (6), where the trustees were held not bound by the direction to accumulate. What you have here is a direct gift in terms of the income to the charities, not a gift on trust to accumulate. It is an immediate gift postponed as to time of payment, and that is only a matter of machinery. There is no reason why, before the time for division has arisen, the trustees should not say that a particular hospital shall have the property when the time for distribution arrives. Before any selection has or can be made, there is an effective dedication of this property to charity.

CLAUSON, J. : But if there is to be no selection for a certain time, there must be an accumulation which cannot be stopped by anyone. That lets in the Accumulations Act.

Andrewes-Uthwatt : The real reason why one talks about power to stop accumulations is that that power arises out of ownership. Here it is clear that charity owns this property, since, apart from any selection, no one but charity can take it. That being so there is a person who can stop the accumulations and that is the Attorney-General.

CLAUSON, J. : Has any judge in England ever gone so far as to treat charity as a definite *persona* which can own property? It is a novel metaphysical conception.

Andrewes-Uthwatt : It is quite clear that the court can administer any charitable property consistently with the purpose for which it is given, and as part of its scheme of administration it can say that the accumulation is to be stopped. See *Re Cardwell, A.-G. v. Day* (7), and *Re King, Jackson v. A.-G.* (8), for examples of the position which the Attorney-General occupies. See also *Re Knapp* (6). If the court under a scheme could provide that the accumulation should stop, so the trustees under this particular will, who are trustees for charitable purposes, could stop it. It is merely a question of the administration of the affairs of charity.

Hunt, in reply : Although the Attorney-General who, in a wide sense, represents charities, may compromise proceedings on their behalf, as was done in *Re King* (8), it does not follow that he can accelerate a future gift in a case like this. If there were no trust to accumulate, but a gift to persons to be ascertained at a future date, an accumulation would

be necessary. It is for the testator to decide when the fund shall be distributed.

Re Knapp (6) was a very special case. There was merely a wish expressed that the fund should be accumulated.

Re Platt (4) does not apply to this case because here there is or must be implied a direction to accumulate during the life of the annuitant, and when the testator speaks of the trust estate that means the trust estate including accumulations. In case of a deficiency the annuitant would be entitled to have recourse to the accumulations.

CLAUSON, J. : Mr. Jefferies died in the month of June, 1912, so that the period of twenty-one years from the date of his death expired in June, 1933. [His Lordship read the relevant parts of the testator's will and fifth codicil.]

The point to which my consideration is directed is as to the operation of this gift of residue. I shall have to take into account, when I have considered it, the provisions in the Accumulations Act, which prevent accumulations for more than twenty-one years, but I need not refer to that Act for the moment. The first thing I have to do is to construe this will, and, having construed it, I shall then have to apply the Act to the will in accordance with its meaning.

The first question, therefore, is what is the operation of this gift of residue. Paying the best attention I can to the words of the will, it appears to me that the testator is giving gifts which are to operate after the death of Mr. Martin, or are payable before the death of Mr. Martin in the case of certain sales with his consent. It is a gift to operate at a future date, in favour of persons to be ascertained at a future date—the persons in this particular case being not individuals, but charities—by a selection to be made by the persons who at that future date are the trustees under the will. What then is the effect of that gift? Assuming that the income is sufficient to keep down Mr. Martin's annuity, which I am told, as a matter of fact it is, it will be impossible for the trustees to distribute that surplus income, as indeed the will contemplates, since it contemplates that, when the future date comes for the distribution of the fund, it will be made up to some extent of the balance of income accumulated during the lifetime of Mr. Martin.

It is, of course, well recognised that if, on the true construction of a will, there is a vested interest in the persons who are to take, but the testator inserts provisions which prevent such persons coming into full enjoyment of that which they are to have, the directions of the testator can, and in certain circumstances will be disregarded by the court. *Saunders v. Vautier* (1) deals with the case of beneficiaries who are individuals and the decision of the House of Lords in *Wharton v. Masterman* (2) deals with the case where the beneficiaries are not indi-

viduals, but are in effect charitable bodies, whether corporate or incorporate.

But it appears to me in this case that I am outside any of the authorities which are indicated in *Saunders v. Vautier* (1), or *Wharton v. Masterman* (2), because this is a case of a future gift to legatees to be ascertained in the future, by a process which is not to take place until a future time, and which is also to be effected by persons who are, at present, not ascertained, namely, the persons who happen to be trustees of the will at that date. That being so, it necessarily seems to follow that, after the expiration of twenty-one years, the accumulation which is directed by the will, or is necessary because one cannot carry out the trusts of the will without laying aside to some extent the income from the estate, must be treated as being against the Accumulations Act, and the next-of-kin will step into the gap between the expiration of the twenty-one years from the death of the testator and the death of the annuitant.

It has, however, been most forcibly argued by Mr. Andrewes-Uthwatt, for the Attorney-General, that on this will I can come to a different conclusion. The argument is put in this way. It is suggested that the only beneficiary, other than Mr. Martin, under this will is an entity, if I may use a word which is not a very satisfactory one in this context, which can be spoken of as charity. Charity, therefore, is the beneficiary. Although the exact means of ascertaining the proper method of administering the fund so as to carry out the charitable wishes of the testator is, it is said, no doubt a form which looks to the future, there is one beneficiary only, namely, charity, which nothing can divest of the gift; and accordingly the case is strictly analogous to the case of an annuity in favour of an annuitant, with a gift over to a person now ascertained, but subject to directions given by the testator which the court is bound to disregard, if it can be said that they merely postpone the enjoyment of the person in whom the absolute enjoyment of the gift is vested.

The conception put forward is one of great interest and is one which may become embodied in English law, but I think it is not for me, sitting as a judge of first instance, to admit this ingenious, and, I think, quite novel theory as to the operation of the Accumulations Act, unless I am quite clear as to the position under the will. Now in my view, even if I were able to accept the principle put forward, I am not clear that it ought to be applied to this will, because this will did not make the gift to charity, subject only to the trustees' power of selection. This will is one in which certain objects, which are certainly charitable institutions, are, at a future time, if selected by a future process, to be legatees of the ultimate fund. In other words there is no interest vested in anybody, but it is a case of a future gift to a class of institutions to be

ascertained in the future by a process of selection marked out by the testator. I quite agree that, if the process of selection marked out by the testator failed, owing to the trustees refusing to carry it out, the court, no doubt, would interpose and set up its own machinery for carrying out the testator's wishes, but that, in my view, leaves untouched the fact that this is a gift with a future operation. I therefore declare : (1) that, as from June 15, 1933, the direction contained in the will of the testator for accumulation of the income in excess of that required for meeting the annuity to George Alfred Martin became void ; (2) that the proceeds of sale of part of the testator's real and leasehold estate sold before June 15, 1933, and the accumulations of income of such proceeds of sale ought to be divided among such London hospitals in the administrative County of London as the trustees of the will select ; (3) that the real and leasehold estate unsold on June 15, 1933, then became vested in the trustees upon the statutory trusts for sale without the necessity of the execution of any further document and without any consents being required to sales ; (4) that the annuity of the defendant Martin will not cease to be payable on the sale of all the testator's real and leasehold estate in the lifetime of the said defendant.

Solicitors : *Dollman & Pritchard*, agents for *Hayward, Smith & Mackey*, Rochester (for the plaintiffs and the first defendant) ; *Kingsford, Dorman & Co.* (for the second and fourth defendants) ; *Lindo & Co.* (for the third defendant) ; *Treasury Solicitor* (for the fifth defendant).

[*Reported by* C. M. YOUNG, *Barrister-at-Law.*]

MATANIA *v.* THE NATIONAL PROVINCIAL BANK, LTD.,
AND THE ELEVENIST SYNDICATE, LTD.

[COURT OF APPEAL (Slessor and Romer, L.JJ., and Finlay, J.), **May 22, 1936.**]

Landlord and Tenant—Covenant for quiet enjoyment—Breach—Building operations on adjoining part of premises—Conditional consent by lessor—Condition not fulfilled—Nuisance—Building operations—Dust and noise—Independent contractor—Danger of works amounting to nuisance.

In 1925 the whole of certain premises were demised to the defendant bank with a restriction against alteration without the consent of the lessor. In 1933 the bank demised the second and third floors of the premises to the plaintiff with the usual covenant for quiet enjoyment and to perform and observe the covenants in the head lease. In 1934 the defendants, the Elevenist Syndicate, wished to take the first floor of the building and for this purpose extensive alterations were necessary. The bank obtained the consent of the head lessor to the alterations subject to the consent being obtained of all the sub-lessees, and the bank subsequently gave a similar consent subject to the same terms and conditions. The plaintiff's consent was never obtained. The Elevenist Syndicate, however, proceeded to instruct contractors to carry out the alterations, and, no proper precautions being taken, the plaintiff

suffered damage by reason of the dust and noise caused by such building operations. The plaintiff brought an action for damages for breach of the covenant for quiet enjoyment, nuisance and trespass:—

HELD: (i) as the consent to the alterations being carried out was subject to the plaintiff's consent being obtained, and this was never obtained, the position was that there was no proper consent to the alterations being effected.

(ii) the bank's consent being subject to the consent of the plaintiff, which was not obtained by the Elevenist Syndicate, there was no breach of the covenant for quiet enjoyment and no derogation from the grant.

(iii) although the Elevenist Syndicate had employed independent contractors, they were liable in damages for nuisance since the work to be done in its very nature involved a risk of damage being done to the plaintiff.

(iv) as the bank had covenanted with the plaintiff that it would observe all the covenants of the head lease and were in default upon this covenant, the appeal must be allowed without costs.

[EDITORIAL NOTE. There are two points in this appeal. The first is as to a breach of a covenant for quiet enjoyment. A lessor can only be liable to one lessee on such a covenant by reason of damage occasioned by another lessee of his if he has given his consent to the carrying out of the operations causing damage. If he has given his consent to the second lessee subject to the first lessee being applied to and giving his consent, and the latter consent is never asked for, then the lessor has in law given no consent, and is not liable. The other point concerns the defence of independent contractor in nuisance and is a further application of the rule that this defence is not available where the operation to be performed clearly involves in its very nature the risk of damage being done to the plaintiff. This rule was laid down in *Dalton v. Angus* (4), but is more fully stated in *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.* (3).

AS TO COVENANTS FOR QUIET ENJOYMENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 240, 243, 244, paras. 266, 272; and FOR CASES, see DIGEST, Vol. 31, pp. 132, 133, 136, 137, Nos. 2664-2666, 2711-2718.

AS TO DEFENCE OF INDEPENDENT CONTRACTOR IN NUISANCE, see HALSBURY, 1st Edn., Nuisance, Vol. 21, p. 557, para. 956, and FOR CASES, see DIGEST, Vol. 34, pp. 164, 165, Nos. 1275-1278.]

Cases referred to:

- (1) *Harrison v. Southwark & Vauxhall Water Co.*, [1891] 2 Ch. 409; 36 Digest 162, 44.
- (2) *Gosnell v. Aerated Bread Co., Ltd.* (1894), 10 T.L.R. 661; 36 Digest 226, 669.
- (3) *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K.B. 191; Digest Supp.
- (4) *Dalton v. Angus* (1881), 6 App. Cas. 740; 34 Digest 164, 1276.
- (5) *Black v. Christchurch Finance Co.*, [1894] A.C. 48; 34 Digest 162, 1266.
- (6) *Bower v. Peate* (1876), 1 Q.B.D. 321; 34 Digest 164, 1275.

APPEAL from a judgment of CHARLES, J., given on Dec. 10, 1935. The plaintiff claimed damages for the breach of the covenant for quiet enjoyment and also for nuisance and trespass. CHARLES, J., found that the covenant for quiet enjoyment had been broken and gave judgment against the defendant bank in respect thereof. He found against the plaintiff and in favour of all the defendants on the grounds of nuisance and trespass. The bank appealed against the finding of the breach

of covenant for quiet enjoyment and the plaintiff brought a cross-appeal against the defendants, the Elevenist Syndicate, Ltd., for damages for nuisance. The contractors who were defendants in the action, were not parties to the appeal. The facts and arguments fully appear in the judgments.

R. F. Roxburgh, K.C., P. B. Morle and Reginald Knight for the appellants, the National Provincial Bank (respondents in cross-appeal).

Trevor H. Hunter, K.C., and A. Clement Edwards, for the respondent, Mr. Matania (appellant in cross-appeal).

J. W. Morris, K.C., and S. K. de Ferrars, for the Elevenist Syndicate (respondents in cross-appeal).

SLESSER, L.J. : This is an action brought by Mr. Matania for damages for breach of covenant for quiet enjoyment contained in a lease, in which he was lessee, and also damages for nuisance and trespass upon his premises, whereby he was seriously injured in his profession as a teacher of music. Mr. Matania, who has been in England for a considerable time, is a professor of music, and teaches singing, and in 1935 he wished to acquire a large room for teaching and singing, for holding concerts, and if necessary, for the use of an operatic society. For that purpose he acquired certain premises at the junction of the Edgware Road and Nutford Place. They were commodious premises, consisting of six rooms, and two passages on the second and third floors. There were certain partitions in these rooms, but they were taken down, and the rooms were transferred into a large studio which would hold at least one hundred people. He entered into possession on Aug. 25, 1933. The ground floor was occupied by the National Provincial Bank, Ltd. Now about Jan., 1934, he was approached by a society called the Elevenist Syndicate, Ltd., a branch of a religious organisation devoted to promoting the doctrines of Christian Science, who wished to lease the first floor. Questions arose, I suppose, in their minds whether, when they were using the first floor—which they intended to use, in part, as a reading room—singing lessons would not destroy the amenities of their rooms. Mr. Matania proved on this occasion, as indeed, on all other occasions, to be most reasonable and considerate. He caused test sounds to be made, auditions and the like, and they expressed themselves satisfied. He offered to insulate his piano, to put down rugs, and various kinds of things, in order that the noise which he was making might not disturb the reading and meditations which were intended to be practised on the lower floor. It became necessary for the Elevenist Syndicate to have done, on the first floor, very considerable alterations. A great many partitions had to be removed, and, among other matters, immediately below the floor of Mr. Matania's studio it became necessary to insert a

girder, and also to extend upwards the stanchions in the bank premises, in order that they might support that girder. The alterations, therefore, were rather more than merely taking out the partitions. They involved the hoisting of a large steel girder and the erection of stanchions. All this involved taking away the ceiling of the floor below Mr. Matania's studio, so that, in the result, while the works were proceeding, in the language of Mr. Matania, which the learned judge adopts, he was standing upon a grate or grid. These works started on Mar. 26, 1934. They were carried out by a firm of contractors, on behalf of the Elevenist Syndicate, called Messrs. T. H. Adamson & Sons, and already, on Mar 30, 1934, Mr. Matania has started to complain. He writes a letter to the secretary of the New Reading Room of the Elevenist Syndicate, first of all pointing out he will put insulators under his piano legs, and large rugs on the floor. Then he says: "I agree to arrange for my concerts and rehearsals after 6.30 p.m. on Sundays and after 7.30 p.m. on Wednesdays," so that he was willing to do everything in his power that the noises which he was making, beautiful as they may have been, should not penetrate into the reading rooms. Then he goes on thus:

The builders started on Monday, 26 inst., and although I appreciate the care on the part of the foreman in conducting the work downstairs, I am compelled to tell you that since Monday [the very day on which the work was started] it has been quite impossible for me to carry on my work. The unavoidable hammering for the demolition and especially for the preparation and installation of the girders, which are directly underneath my studio, and the consequent shaking and noise, make it utterly impossible for me to give lessons, although I have made every effort to do so. The work starts at 8 a.m. and finishes at 5 p.m., and from 5 to 6.30 (when I must leave for evening school) leaves me, as you will appreciate, far too short a space of time within which to give all my lessons. I understand that this state of affairs is necessarily to continue for some time, and I can only therefore leave it to your committee, with whom I would like an interview on the matter, to see that some friendly arrangement be reached in order to reduce my loss. Of course, you will understand, that this state of affairs entirely precludes me from introducing new pupils to my studio during this period.

Now I may say at once that, as regards this letter, evidence corroborating which was given at the trial by a number of pupils—there was no criticism of this evidence at all—there can be no doubt about it. There can be no doubt on the evidence that this gentleman was prevented from carrying on his lawful business by means of these noises and the dust. In answer to that letter apparently the architects told the contractors of Mr. Matania's complaint, but I am unable to see, looking at the evidence and reading the letters, that anything was ever done by the contractors to mitigate the noise, or the dust; except this, that there is evidence to the effect that they would endeavour to make their greatest noise on a Friday when Mr. Matania was not conducting his lessons. There is,

however, a very significant telephone message on Apr. 26, 1934, sent to Mr. T. H. Adamson. He says this :

Mr. Paul Phipps [that is the architect] rang up to suggest his assistant, Mr. Pearce, should call at our office tomorrow morning at 9.30 to see our setter out in connection with the staircase. He thinks that it would be better to have continuous balusters without any newel. He mentioned the Italian tenant [that is Mr. Matania] on the upper floor had written them a very nasty letter and is threatening legal proceedings. He wishes us to take all the steps we can to avoid any unnecessary noise, and if it puts us to any additional expense we must of course charge for it.

That letter, in itself, is a little significant, I think. It looks as if certainly before Apr. 26, 1934, the contractors had not taken sufficient, or perhaps, any steps to avoid the unnecessary noise, and they seem to contemplate that there were some steps to be taken which may be charged for. At any rate, I can find no evidence that anything specific was done. Then, finally, when the matter gets into the hands of the solicitors, they do not seem to dispute, but that there had been a considerable noise made. There is really no conflict in the evidence at all, but the question was raised before the learned judge, and raised again before us, whether if this work was to be done at all, it could have been mitigated, or could have been avoided, so far as it produced this nuisance destructive of Mr. Matania's business. It is clear from the evidence, both from the experts called on behalf of the plaintiff and those on behalf of the defendants, that the dust, to a large extent, if not entirely, could have been avoided by means of sheeting. Then as to the noise, it is said that there was no evidence that the noise could have been mitigated. I am not satisfied, speaking for myself, that it was shown that this work causing this noise need have been done during the hours when Mr. Matania did his work. He says : " I could not give lessons except in the evening, when the work was finished at five o'clock." It is true, as I have said, that there was a suggestion that the most noisy work of all should be done on a Friday, when Mr. Matania was not carrying on his work, but I find no suggestion at all, on behalf of the defendants, the contractors, and the Elevenist Syndicate, although evidence was called by the contractors in the court below, to show that it was necessary that this work should have been done during the hours when this gentleman was carrying on his work as a singing master. What the legal effect of these conclusions may be I will consider hereafter. For the moment I am only concerned to consider the evidence, but I think that this emerges from the case. I do not know that the distinction has been, perhaps, quite clearly taken in the court below between the dust and the noise which were inevitable on the first floor where the reparation work and alterations had to be done, and the inevitability of the dust and noise coming on to the premises of Mr. Matania. I do think that the evidence goes to show, as far as we

know, that it was a necessary consequence of doing the work that there would be this noise and the dust on the first floor where the girder had to be put up. Whether it was necessary that that noise should percolate through to the premises of Mr. Matania is another question about which I have said there is some evidence to suggest that it need not.

Now, having stated generally these facts, I will turn now to the leases which, to some extent, determine this matter. It will be remembered that in the writ and in the statement of claim, the claim was made, both on the basis of breach of covenant by the bank for quiet enjoyment and also trespass and nuisance. In the result, in the present case, the learned judge has given judgment against the bank for breach of covenant for quiet enjoyment, or for derogation of grant to Mr. Matania, and has found in favour of the defendants, the Elevenist Syndicate and the contractors, Adamsons, in respect to the claims of trespass and nuisance, and has acquitted the bank also for the claim of trespass and nuisance. The appeal was brought by the bank against the decision against them, and there is a cross-appeal brought by Mr. Matania against the Elevenist Syndicate. There is no appeal here with regard to Adamsons, the contractors. Now, as I have said, as regards the appeal which concerns the bank, that is only with regard to the covenant for quiet enjoyment. It is said on behalf of them by Mr. Roxburgh that, whatever else may be the result of this case, the learned judge was wrong in finding the bank to blame for breach of covenant for quiet enjoyment, and for this reason, if for no other, that whatever was done here by the Elevenist Syndicate, or by the contractors, was not done with the authority of the bank, or done lawfully, but was done without their authority, and, in any event, the bank is in no sense responsible. It becomes necessary, therefore, for the various documents of title which produce the legal relationships between the parties to be looked at. First of all there is a lease dated Mar. 23, 1925, between the freeholder and the National Provincial Bank. That lease demised to the bank the whole of the premises 128 and 130, Edgware Road, together with the cellars and messuages, and so on, in the occupation of the lessees. That would include the whole of the building which is here under consideration, and, so far as that lease is concerned, it is important to notice this that there is express provision :

That the lessees will not at any time during the term hereby granted use the demised premises [for certain purposes such as] carrying on of the trade or business of a victualler or for a brewhouse, or as a place of public worship, without the consent in writing of the lessor, and will not without the like consent have or permit to be had any sale by auction or any meeting.

Then follow these important words :

and will not without the like consent have or permit to be had any sale by auction

or any meeting . . . and will not without the like consent erect build or put up or permit to be erected or built or put up in the demised premises any building erection or portico bay window sign signpost or other post in upon before adjoining or which shall project beyond the external walls of the premises nor any advertisement or writing or plate on any part of the premises above the sills of the windows of the first floor of the premises nor alter nor pull down any erection or building standing on the premises nor maim or cut the main timbers of any building on the premises.

It is clear, therefore, that before the bank alter or pull down any erection or building standing on the premises, or maim or cut the main timbers of any building on the premises, it is necessary for them to obtain the consent of the landlord. Next we have to consider the lease made between the National Provincial Bank and Mr. Matania, which is dated Mar. 25, 1933, which, as I have said, demised the two top floors and the use of the entrance hall and staircase to him for a term of fourteen years, subject to certain powers of determination. That contains, in clause 1 (*h*) a clause similar to that in the head lease with regard to using the premises in a manner likely to become a nuisance, or as a brewhouse for the sale of beer, and so on. Then there follow the same words :

nor alter nor pull down any erection or building standing on the premises nor maim or cut the main timbers of any building on the premises

without the consent in writing of the lessors. Then follows in clause 4 (*a*) this covenant by the lessors :

That the lessors shall during the continuance of the said term duly and punctually pay the rents or sums of money reserved by and perform and observe all the covenants, agreements and provisions (including the covenant to pay rates, taxes and other outgoings with the water rate) which are contained in the lease under which they hold the same premises and which on the part of the lessee or lessees thereunder are and ought to be performed and observed (except such of the said covenants, agreements and provisions as are embodied herein and as are to be performed and observed by the lessee hereunder) and will keep the lessee indemnified therefrom respectively.

Then (*b*) says :

That the lessee paying the rent hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on his part to be performed and observed may (subject to the reservations, covenants and provisions herein contained) quietly enjoy the said premises during the said term without any lawful interruption or disturbance from or by the lessors their heirs executors administrators or assigns.

It is on that clause 4 (*b*) that the question of quiet enjoyment here arises. Now, as I have said, it became necessary, in order that these alterations should be made in the premises which were intended to be used by the Elevenist Syndicate, to get certain consents. The matter had been under discussion for some time with the lessors. There are letters passing on the matter in 1933. On July 13, 1933, there is a letter from the bank

to Colonel Key, the chairman of the Reading Room Site Committee, in which Mr. Symes, the manager says :

Alterations. Any alterations proposed by the tenants must be submitted to us for approval by the bank's architect and we would mention that such alterations will require the approval of our head lessor.

Now, so far as the head lessor was concerned, there were granted, on Feb. 22 and on Mar. 20, 1934, respectively, two licences to the bank to permit the Elevenist Syndicate to use the premises as a Christian Science reading room, and to make certain alterations. The first, which is signed by Mr. Furmedge, on behalf of the lessor, says :

I hereby give and grant licence and authority to the National Provincial Bank, Ltd., and its assigns, to permit the Elevenist Syndicate, Ltd. to use as a Christian Science reading room and a place for the relief of sickness and disease in accordance with Christian Science practice and the relative rules and regulations contained in the eighty-ninth edition of the Church Manual the first floor and the room off the staircase.

That may possibly have reference to the question of religious services which was one of the conditions in the original covenant for which consent was needed. Then there was another licence that they might permit the Elevenist Syndicate to project from the first floor an illuminated sign. With regard to the plans, there had already been passed before these licences on Dec. 20, 1933, an approval by Mr. Furmedge of the plans for the alterations of these premises on the first floor—but

Approved on the part of . . . the freeholder subject to the consent being obtained of all lessees and under-tenants of the premises.

Now it is stated by Mr. Matania in his evidence, and not seriously contested, that such consent was never sought from Mr. Matania at all, and therefore the condition upon which the head landlord gave approval to the plans, that is to say, that they were to be subject to consent being obtained from all under-tenants and lessees of the premises, was not satisfied. Consequently, it follows that as regards the bank they had not obtained the consent to the alterations of the building, because the consent to that alteration was only given subject to the condition that the consent of Mr. Matania was obtained, and such consent never was obtained. Consequently, with regard to the lease of May 25, 1933, between the National Provincial Bank and Mr. Matania, and clause 4 (a), in which the bank covenant that they will observe all the covenants which are contained in the lease under which they held the said premises, they had not observed that covenant because they had, contrary to their covenant with the landlord, allowed an alteration which the landlord, had never consented to because he only gave his consent conditional on Mr. Matania consenting.

So much, therefore, for the position of the landlord, but, or course,

the matter does not end there. Mr. Roxburgh says that in so far as this consent was not obtained, the consent to the alterations, which was given in a document to which I will now refer, was not complete as regards the bank itself. On Mar. 23, 1934, the bank gave to the Elevenist Syndicate a consent to their making "such alterations as are shown in the plan prepared by you and submitted by us to the Portman Estate office"—that is the same plan to which I have already referred—on which the words, "approved on the part of Captain the Hon. G. B. Portman as the freeholder, subject to the consent being obtained of all lessees" are written, and it is in accordance with this plan and the terms and conditions thereon which are thereby expressly referred to, for there follow these words at the end: "We also approve of such plans, subject to the same terms and conditions as are endorsed thereon." As I have already said, one of the terms and conditions was that the consent of the lessees and under-tenants should be obtained. The consent of Mr. Matania never was obtained. Therefore the bank never did give any authority to the Elevenist Syndicate to undertake these works, because the condition of the approval is unfulfilled. Now, in those circumstances, can it be said, even if the fact would otherwise make a breach of covenant for quiet enjoyment, that the bank, not having given consent to these acts which are said to be a breach of the covenant, is responsible? With every respect to the learned judge, I cannot find that he has given any weight to this consideration which Mr. Roxburgh has urged upon us. He says this:

They [the bank] were also aware that it was their duty, and I think it was their duty and not the duty of the Elevenist Syndicate, Ltd., before they could establish that as a firm and sound lease, to get the consent of the head landlords.

That consent, for reasons which I have pointed out, was never obtained, because it was deficient in that Mr. Matania had not consented. He then goes on, after dealing with other matters which I need not trouble with:

Now it is perfectly true as between the plaintiff and the Elevenist Syndicate, Ltd., the fact that no consent was ever obtained from Mr. Matania, which was a term of the Portman Estate licence, is really not of importance.

In my view it is of the very greatest importance to see whether this condition that Mr. Matania's consent should be given was or was not carried out, and the importance of it, I think, is quite clear on the authorities, which go back for a considerable period, but it is sufficient for my purpose to take the note which appears in WILLIAMS' NOTES TO SAUNDERS' REPORTS, Vol. 2, at p. 525 to this effect:

the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose; for the law itself does

defend every man against wrong, and therefore though one warrants land to another expressly, yet he does not defend against tortious entries,

and the latter cases but corroborate this view. It is stated I think, correctly, in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 20, Landlord and Tenant, p. 240, para. 266 :

It is no breach if the interruption is caused by an adjoining lessee whose lease, though granted by the same lessor, does not authorise the act causing the interruption.

There having been no authority given at all by the bank for this act being done in the way in which it was done for want of the consent of Mr. Matania having been obtained, I find it difficult to see how it can be said, that there can here be any breach of covenant for quiet enjoyment on the part of the bank.

The same observations appear to be true with regard to the question of derogation of grant which was not pleaded. The Elevenist Syndicate, as it seems to me, *quoad* the bank must be regarded as persons who have done unlawful acts on these premises without authority, and for that the bank cannot be made liable under their covenant, because it is not a lawful interference with the quiet enjoyment for which the bank are responsible and it is done without their authority. It follows, therefore, for this reason, which is a sufficient reason, that this appeal succeeds as regards the bank. A question will arise as to the matter of costs in this particular. I have already indicated, that the bank were in default to Mr. Matania in this respect. They have covenanted with him that they would carry out all the provisions of the head lease, one of which was that alterations should not take place without the consent of Mr. Matania. To that extent it is a matter of argument how far that may effect the question of costs. So far as regards this case, I am of opinion that Mr. Roxburgh is right, and that by reason of the fact that it is not possible to say, that what the Elevenist Syndicate did they did with the authority of the bank or was otherwise lawful, the bank cannot be held responsible for the acts done, even though those acts would otherwise constitute a breach of covenant for quiet enjoyment.

This brings me, therefore, to the question of the cross-appeal. This cross-appeal raises a different matter. It is said that as regards the cross-appeal firstly—I take it in this way—the contractors, Messrs. Adamson, did commit a nuisance of allowing this dust and this noise to come upon the premises of the plaintiff. It was pointed out in the court below on behalf of the contractors who, of course, as I have said, are not parties to this appeal, and it is now pointed out by Mr. Morris, in so far as he, as the person who made the contract with Messrs. Adamson, may be held responsible, that what they have done is no more than they were entitled to do as the authorities stand, and reliance is placed

in particular on the judgment of VAUGHAN WILLIAMS, J., as he then was, in the case of *Harrison v. Southwark & Vauxhall Water Co.* (1). The headnote reads :

The defendants, in the exercise of their statutory powers, sunk a shaft in land adjacent to the plaintiff's house, and for this purpose employed certain lift-pumps, the noise of which seriously interfered with the plaintiff's comfort. The plaintiff having commenced an action for nuisance the defendants substituted centrifugal pumps, which diminished the noise of the pumping. When the sinking of the shaft was commenced, it became necessary to lower and lengthen the pumps from time to time, but at the date when the centrifugal pumps were substituted, the sinking of the shaft had arrived at a point at which this operation had ceased to be necessary. The defendants might have used centrifugal pumps from the commencement, but they were less convenient on account of the difficulty of lowering and lengthening them, and on account of the increased labour attending their use, and they were not the pumps ordinarily used in sinking shafts.

There was a question in the case with regard to whether it made a difference that they were acting under statutory powers, but that matter here does not arise. What is relied upon is this. In the judgment of VAUGHAN WILLIAMS, J., he says this at pp. 413 and 414 :

It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours ; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. [I emphasize the word "necessarily."] The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition ; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance.

Now, it will be noticed that the learned judge is careful to qualify his remarks by the use of the words : " if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition," and it seems to me that in the present case, looking at all the facts of the case, it is not possible to say that here Messrs. Adamson did use all reasonable skill and care. In the first place, I have already pointed out that they could, on the uncontradicted evidence, have prevented the admission of the dust into Mr. Matania's room by the use of sheets. That is stated by various witnesses. I see no reason to suppose that some arrangement could not have been made whereby the noise, which the learned judge has found to be intolerable and preventive of Mr. Matania

carrying on his business, could not have been avoided at least to this extent, that for some hours of the day, while he was carrying on his business, these persons should have suspended operations or done their work on some day, as was suggested with regard to Friday, when he was not conducting his work. I see no reason to suppose, and this is a re-hearing, that on the evidence which was before the learned judge—it does not depend in this case on the veracity or demeanour of the witnesses—we are not entitled to draw the conclusion that both as regards the noise and the dust the contractors did not use reasonable skill and care to avoid the undoubted noise and dust which obtained in the lower room from reaching the upper room in which Mr. Matania gave his lessons.

The later case of *Gosnell v. Aerated Bread Co., Ltd.* (2), where *Harrison v. Southwark & Vauxhall Water Co.* (1) is approved by STIRLING, J., is interesting in particular for this fact, that at the bottom of p. 662, STIRLING, J., as he then was, says this :

It was suggested by the plaintiffs that the works might be carried on before business hours in the morning, and after business hours in the evening, but there was no evidence to show how that would affect the other neighbours, nor was there anything to show whether the surrounding property was residential or not.

In the present case there is no question of other neighbours being affected. Therefore, that is interesting as showing that the possibility of an avoidance of what otherwise might be a nuisance was present to the mind of STIRLING, J., at that time. It is perhaps not very easy to say exactly what does and does not excuse a nuisance said to be temporary, or sometimes said to be evanescent, fleeting or occasional—all those words are used. In *KERR ON INJUNCTIONS*, 6th Edn., at p. 137, it is put thus :

The court will not as a rule interfere by injunction if the damage is slight or the nuisance is merely of a temporary or occasional character : but a damage, though in itself slight, may from its continuance, or constant repetition, become sufficiently substantial for the interference of the court. If a defendant causes a nuisance to his neighbour, it is no defence to say that he is making a reasonable use of his premises.

In the present case it seems to me sufficient without attempting any definition—I doubt very much if any definition could be successfully laid down for that which must, from its very nature, be a question of degree—to say here that I do not think on this evidence that reasonable skill and care was taken to prevent the result of this noise and dust which were being created and, therefore, to that extent I find myself in disagreement with the judgment of the learned judge. The learned judge, having found the nuisance to be intolerable, has come to the conclusion that there was no actionable nuisance because he says that he was unable to see that anything in the carrying out of the operations

by the contractors was carried out other than in a proper and reasonable way, avoiding unnecessary noise, unnecessary dirt and unnecessary dust. The learned judge seems to have overlooked the fact I have already remarked upon more than once that so far as dust is concerned, the evidence was that it was not inevitable but evitable and that as regards the noise, for the reason which I have said, I think that that also could at least have been mitigated, if not avoided, by an arrangement about times when this building work took place.

Now there remains one other matter, and an important one, which Mr. Morris has agrued before us with great force and with which I have to deal. There is no doubt in this case that Messrs. Adamson are independent contractors, and being independent contractors, save for exceptional circumstances, in the ordinary way those employing them would not be liable for their wrongful acts in negligence or in nuisance. That is made, I think, quite clear without any question in the recent case of *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (3). In the judgment of this court it says this at p. 196 :

It is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract.

That is there stated as the general principle, and Mr. Morris says that the circumstances of this case are such as to bring these facts within that general principle. He says also that Messrs. Adamson, even if they had committed a nuisance, had been acquitted in the court below, that they are not respondents here and that the Elevenist Syndicate, who are respondents here on the cross-appeal, cannot be made liable for the acts of the independent contractor. The case of *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (3), which is the latest pronouncement of this court on this point and sums up, and perhaps to some extent extends or at any rate makes more clear, what is, I think, implicitly contained in such cases as *Dalton v. Angus* (4) and *Black v. Christchurch Finance Co.* (5) goes on to say that there are exceptions to this rule and the exceptions are stated to be these (p. 197):

It is clear that the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. The incidence of this liability is limited to certain defined classes, and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others.

Here, of course, we are not concerned with danger such as might found an action for negligence. We are here concerned with annoyance such as may found an action for nuisance, but the principles in my opinion

are the same as regards the liability of a person who employs an independent contractor, that is to say, that if the act done is one which in its very nature involves a special danger of nuisance being complained of, then it is one which falls within the exception for which the employer of the contractor will be responsible if there is a failure to take the necessary precautions that the nuisance shall not arise. Now, what are the facts of the present case? They are these. It is really not in dispute that as regards the place where this work was to be done this noise and this dust were inevitable. That is the evidence of both the plaintiff and the defendants, and it is the conclusion of the learned judge. The only question which I see is whether in that state where the production of noise and dust is inevitable, sufficient precautions were taken to prevent that noise and dust affecting Mr. Matania. In every case, whether it be a case of ordinary employment of a contractor or whether it be a case of a hazardous operation, the problem must arise whether a precaution would or would not prevent the result of an operation. To say that a precaution will prevent the result of an operation does not by itself take the case outside the rule that a person may be responsible, where the act is a hazardous one, for the acts of his contractor. Where the act is hazardous, to presume that every hazardous act would result in the danger or the nuisance would be to say that the act was inevitable in its consequences, regardless of any question of precaution or not, but that is not the right way of looking at it. In the case to which I referred, the case of *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (3) it was not inevitable that the fire, which was brought into the theatre, would necessarily under proper precautions set the theatre on fire, but it was a hazardous operation to bring the fire into the theatre. So it was hazardous as regards the possible nuisance to Mr. Matania to bring the noise and dust immediately below his apartment. What is said is with sufficient and proper precaution the result of that hazardous operation could have been avoided without detriment to him. The case of *Honeywill & Stein, Ltd.* (3) follows, as I have said, the case of *Dalton v. Angus* (4) which in its turn had approved the earlier case of *Bower v. Peate* (6). I do not think it necessary myself to consider these cases, because I think the principle has been sufficiently stated so recently in this court that it is enough to say that I am of opinion that this was a hazardous operation within the meaning of the exceptions stated in *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (3), that the principle which is there dealing with a case of negligence applies equally to the tort of nuisance, and that, therefore, this being a case of this kind, I think that the Elevenist Syndicate are responsible for the fact that neither they nor the contractors, Messrs. Adamson, took those reasonable precautions which could have been taken to prevent this injury to the plaintiff.

I say nothing about the action in so far as it is framed in trespass. There are difficulties in stating an action in trespass and in nuisance except alternatively. The text book writers seems to differ in their opinions on this point. Sir John Salmond in his book seem to think that the actions are alternative. Sir Frederick Pollock is of the contrary opinion. I think there would be difficulties apart from those, in succeeding in trespass in this case. I think the dust and the noise which were allowed to come upon the premises of Mr. Matania were the result probably of an act indirect and not direct on the part of the contractor, and so probably would found an action in case rather than an action in trespass, but in so far as I have come to the conclusion that the Elevenist Syndicate are liable in nuisance to Mr. Matania, I do not think it necessary to deal with the question of trespass at all.

There remains only the question of damages. The learned judge in his judgment has given, as against the bank on the principle that they are liable for an action for breach of covenant for quiet enjoyment, or alternatively for derogation of grant, the sum of £150. It seems to me that the judge, having assessed the damage supplied by Mr. Matania upon that heading as £150, it would be right to leave that sum undisturbed as regards the action in nuisance successfully brought against the Elevenist Syndicate. The result, therefore, in my opinion, is that the appeal succeeds for £150 damages, and we will deal with the question of costs after my brothers have given their judgments.

ROMER, L.J. : Speaking for myself I should greatly regret if the law of England did not provide Mr. Matania with some remedy in respect of the damage that he has sustained. In my opinion, however, the learned judge has placed the responsibility for that damage upon the wrong shoulders. Now, the learned judge finds as a fact that the noise and the dirt and the dust resulting from the operations on the first floor, to which SLESSER, L.J., has referred, was very great, and the learned judge was quite satisfied it was so great as to make the second floor uninhabitable, that is to say, you could not carry on a conversation with comfort one between the other, much less give music lessons. He further states that the inconvenience placed upon Mr. Matania by these alterations was an intolerable inconvenience, and that the trouble went on from Mar. 26, to July 4, fourteen weeks or more. That fact alone makes me suspect very strongly that the proper precautions were not taken during the progress of this work to render the annoyance to Mr. Matania as small as possible. I hold that suspicion so strongly that I should hesitate to accept the evidence which has been given to the contrary, but there is no evidence to the contrary when the evidence is properly examined. SLESSER, L.J., has been through the evidence in some detail, and I do not wish to repeat what he has said. I only say that it satisfies me

completely that no proper precautions were made to prevent the dust rising into the plaintiff's room, or to subdue, as far as possible, the noise made in the room below, so as to minimise the inconvenience sustained by the plaintiff.

In these circumstances I may consider whether the National Provincial Bank is liable for damage sustained by Mr. Matania. Had the bank given its unconditional consent and authority to the carrying out of these works by the Elevenist Syndicate, it may or may not be that the bank could be rendered liable under its covenant for quiet enjoyment or for nuisance or for derogation of grant. That point has not been argued, and I desire to refrain from expressing any conclusion on the matter, for the bank did not give an unconditional consent or authority for the performance of this work. As SLESSER, L.J., has pointed out, the authority that they gave was a conditional agreement, conditional, that is to say, upon the consent of Mr. Matania, amongst other people, being obtained. The condition was never satisfied, and accordingly the Elevenist Syndicate never obtained authority from the bank to perform the work. In those circumstances it is plainly impossible to hold that the bank are liable under their covenant for quiet enjoyment or for nuisance or for derogation of grant. To that extent, therefore, I think the appeal of the bank must succeed, and that they must be freed from the liability imposed upon them by CHARLES, J.

I next have to consider the position of the Elevenist Syndicate. Now if the Elevenist Syndicate had done this work themselves, in view of the conclusions of fact to which we have come, the syndicate would plainly have been responsible to Mr. Matania for the damage that he sustained by reason of the syndicate not having taken reasonable and proper precautions to minimise that damage, but it is said by them, and said truly : "The work was not done by us, but by our co-defendants, Messrs. Adamson, who were independent contractors." It is, of course, true that in general a person is not liable for damage caused to another by the negligence of his independent contractor, but to that rule there is an exception which has been recognised in a good number of cases, the latest of which is the one to which SLESSER, L.J., has referred : *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (3). In that case the judgment of this court was delivered by SLESSER, L.J., himself. The exception, as I understand it, is this, that where a man employs an independent contractor to do work which of its very nature involves a risk of damage being occasioned to a third party, that person is responsible to the third party if such damage be occasioned and cannot shelter himself under the general principle of non-liability for the negligence of an independent contractor. Now apply that principle to the present case. It appears to me that the syndicate must be held liable. The work that the independent contractor was employed to do was this. He was to remove

a considerable part of the support of the floor of Mr. Matania's premises on the second floor. He was further to remove the lath and plaster ceiling of the first floor room which would have the effect of laying bare the boards and the joists constituting the floor of Mr. Matania's room on the second floor. It is obvious that that work would involve the risk of Mr. Matania being damaged. It would involve the risk of Mr. Matania's floor being let down unless the work was done very, very carefully. It was not let down, and I have no doubt that proper precautions were taken to see that that did not take place. Had it been let down there would have been no doubt but that the syndicate would have been liable. The cases to which SLESSER, L.J., has referred of *Dalton v. Angus* (4) and the earlier one of *Bower v. Peate* (6) were both cases of the independent contractor removing the support of adjoining premises, a nuisance for which the employer of the independent contractor was in both cases held liable. Just as, in my opinion, they would have been liable in this case if they had let the floor down, so, in my opinion, they are liable for the damage caused to Mr. Matania by the dust rising up through the cracks in the floor, and the noise which would be very great in his rooms by reason of his only being protected by a floor constituting what has been called a grid or a grate, instead of a floor with a lath and plaster ceiling underneath. In my opinion, therefore, the damages which Mr. Matania has suffered must be borne by the syndicate. Messrs. Adamson & Sons were acquitted of all blame by CHARLES, J., and Mr. Matania has not appealed against that part of the judgment. So far as regards the damage, I agree with SLESSER, L.J., that £150 is the proper amount. It must be remembered that the damage sustained by Mr. Matania was in respect of the loss of his pupils, and I have no reason to suppose that had the proper precautions been taken to minimise the noise, and to minimise the dust in the plaintiff's premises, he would not have lost any pupils at all. Be it so, I think I am justified in saying that the damages to be paid by the syndicate should be £150.

As SLESSER, L.J., pointed out, we will deal with the costs when we have heard counsel on the matter. I would like to emphasise what he has already pointed out. Subject to what Mr. Roxburgh may say, the whole of these proceedings would have been unnecessary if the bank had taken the trouble to obtain the consent of Mr. Matania to these works. The licence given to them by the Portman Estate was a licence to do the works on the condition that the consent of Mr. Matania was obtained. If Mr. Matania had been approached one cannot doubt that he would have taken advice, and the people advising him would have seen that proper precautions were taken to minimise the damage caused to him. Unfortunately the bank did not think fit to do that, and accordingly these works have been done without the authority of the head landlord, namely, the Portman Estate. Now, as SLESSER, L.J.,

has pointed out, in the lease from the bank to Mr. Matania there is a covenant by the bank to perform all the covenants on its part contained in the head lease. That they have failed to do, and the trouble in this case, therefore, has been occasioned by a breach of the bank's covenant with Mr. Matania, and that is a matter which will have to be taken into consideration in dealing with the costs in this case.

FINLAY, J. : I agree, though on one point I have felt some doubt and difficulty. I desire to preface the whole of the remarks I wish to make by saying this. I speak only on my own behalf, though I have no reason to believe the Lords Justices will in any way differ from what I say. I do think it is an unfortunate thing that the plaintiff here has been involved in an action which we are told occupied six days before my brother CHARLES, and which has occupied the greater part of three days before this court. I say it is most unfortunate, because it seems to me to be quite clear from the correspondence and from the evidence, that if the plaintiff's legitimate complaint had been met with a little tact and good feeling, particularly by the bank, the plaintiff would have been satisfied by an expenditure of money negligible indeed compared with the costs which have been incurred in this large litigation. I cannot forbear from saying how much one regrets that with regard to a matter in its inception capable, one would think, of an easy adjustment, so great an expenditure has taken place.

Having said that, I desire to say a word with regard to the matter upon which I have felt difficulty. With regard to the appeal of the bank, I desire to add nothing. It is with regard to the cross-appeal that I do desire to add a word or two. It is quite unnecessary to add anything to what the Lords Justices have said with regard to the authorities. The cases that used to be cited when this matter arose were *Bower v. Peate* (6) and *Dalton v. Angus* (4), especially a very well-known part in the speech of LORD BLACKBURN, at p. 889, where the law is laid down; but it is now sufficient to refer to the latest case on the subject, *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (3). There SLESSER, L.J., delivering the judgment of this court, points out the principle which is clear and well settled, that the employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. The Lord Justice then goes on to point out—the words have been read, I will not read them again—that there are exceptions, and my doubt has been as to whether this case falls within the rule or within the exception. I thought—to some extent I still think—that there was force in the argument of Mr. Morris, which was to this effect, that this was simply the case of an ordinary contract to carry out repairs to buildings, things which in their nature are bound to cause some inconvenience and discomfort to persons of adjoining pre-

mises, or in premises over the ones where the operations are going on, but I have been convinced by what SLESSER and ROMER, L.JJ., say that this case does fairly come within the exception. It is not at all, of course, a case of the same nature as *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (3). Inevitably these cases differ entirely in their facts. There the question was as to danger; here the question is as to nuisance, but I have been convinced that when the facts here are carefully examined it does appear that this is not a case of mere ordinary building operation; it is a case where unless precautions were taken there was a great and obvious danger that nuisance would be caused, as indeed it was caused. On that ground I assent to the judgment upon this point, regarding it as I think merely as being an application of perfectly well-settled principles to particular facts. As to those principles there is no doubt. I have felt a doubt which I thought it my duty to indicate, as to its application to the facts in this case, but on the whole I am very glad to agree with the view expressed by the Lords Justices.

SLESSER, L.J.: Then the appeal will be allowed with no costs, and no costs against the bank, and the cross-appeal allowed with costs here and below.

Solicitors: *Wilde, Sapte & Co.* (for the appellants, the National Provincial Bank, respondents in cross-appeal); *Cohen & Cohen* (for the respondent, Mr. Matania, appellant in cross-appeal); *Ashurst, Morris, Crisp & Co.* (for the Elevenist Syndicate, Ltd., respondents in cross-appeal).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. THOMPSON
(RECEIVER FOR THE FIRST AND SECOND DEBENTURE HOLDERS OF JOHN A. WOOD, LIMITED).

[KING'S BENCH DIVISION (Lawrence, J.), May 27, 1936.]

Income Tax—Receiver appointed by debenture holders—Assessment in respect of income of company—Income Tax Act, 1918 (c. 40) sched. D, miscellaneous rules, r. 1.

A receiver was appointed as receiver for the first and subsequently of the second debenture holders with power (a) to take possession of the property charged by the debentures, (b) to carry on, or concur in carrying on, the business of the company, (c) to sell, or concur in selling, any of the property charged by the debentures, and (d) to make any arrangement or compromise which they or he should think expedient in the interests of the debenture holders:—

HELD: (i) the receiver was, in such circumstances, the person who received the income and profits of the company within the meaning of sched. D, miscellaneous rules, r. 1, and an assessment to income tax could properly be made upon him in respect of such profits.

(ii) there was no succession in such a case to the trade of the company either upon the appointment as receiver for the first or for the second debenture holders.

[EDITORIAL NOTE.] Assessments upon receivers seem not to have come before the courts in the past and this seems to be a case of first impression. The point decided is that, although he does not acquire the legal interest in the property of the company, he is the proper person to be assessed as the receiver of the income within sched. D, miscellaneous rules, r. 1. The question of a succession to the business is also considered and it is said that there cannot be a succession without a cessation, i.e., the person or company must cease to carry on the business. The appointment of a receiver does not create such a cessation.

AS TO RECEIVER AND INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 373, para. 765, and FOR SCHED. D, MISCELLANEOUS RULES, r. 1 see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 578.]

Cases referred to :—

- (1) *Re Vimbos, Ltd.*, [1900] 1 Ch. 470 ; 10 Digest 792, 4976.
- (2) *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212 ; 10 Digest 796, 5025.
- (3) *Inland Revenue Comrs. v. Paterson* (1924), 9 Tax Cas. 163 ; 28 Digest 111, 684.
- (4) *Gosling v. Gaskell*, [1897] A.C. 575 ; 10 Digest 792, 4975.
- (5) *Cox v. Hickman* (1860), 8 H.L. Cas. 268 ; 36 Digest 328, 91.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts and arguments appear in the judgment.

The Attorney-General (Sir Donald Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the appellants.

Roland Burrows, K.C., and J. Alan Bell for the respondent.

LAWRENCE, J. : In this case the assessments were made upon the respondent, who was the receiver of a company called John A. Wood, Limited, and the commissioners have discharged those assessments because they held that the legal ownership of the company's property did not pass to the respondent on the occasion of either of his appointments, he having been appointed in the first instance as receiver for the first debenture holders and in the second instance as receiver on behalf of the second debenture holders, but that the company's property remained vested in the company ; and they held, secondly, that on no occasion did the respondent succeed to the company's trade ; and accordingly discharged the assessments. The case has been argued before me on two points : first of all as to whether the assessments were properly made upon the receiver as being the person who received the income within the meaning of sched. D, miscellaneous rules, r. 1, and secondly, whether the receiver ought to be assessed on the footing of being the person who had succeeded, either on his appointment as receiver for the first debenture holders or on his appointment as receiver for the second debenture holders, to the trade of the company. In the course of the argument it was conceded

that possibly the question of whether there had been a succession might be a question of fact, and that it would be difficult to argue that there was not evidence for the commissioners to find that there had been no succession in this case. I will deal with that aspect of the matter when I come to deal with the question of whether there has been a succession or not ; but the first point is whether the receiver was the right person to assess, upon which point the commissioners have decided against the Crown's contention that he was not the right person to assess. That question turns primarily upon sched. D, miscellaneous rules, r. 1, which is in these terms :

Tax under this schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this schedule is hereinbefore directed to be charged.

The receiver in this case was appointed under a debenture which was in substantially the same terms as the debenture in the case of *Re Vimbos, Limited* (1), in which it was held that a receiver appointed under such a debenture as that was an agent for the debenture holders and not an agent for the company. Under that debenture the powers of the receiver were, first, to take possession of the property charged by the debentures ; secondly, to carry on, or concur in carrying on, the business of the company ; thirdly, to sell, or concur in selling, any of the property charged by the debentures ; and fourthly, to make any arrangements or compromise which they or he shall think expedient in the interest of the debenture holders. It has been contended by Mr. Burrows on behalf of the respondent that the receiver appointed with those powers, having regard to the findings of the commissioners in para. 7 of the case, did not receive the income of the company within the meaning of sched. D, miscellaneous rules, r. 1. In my judgment that contention is unsound. It appears to me that the receiver, who has power to take possession of the property and who does take possession of the property and who carries on or concurs in carrying on the business of the company, as the respondent did, must receive the income of the company.

I was referred by Mr. Stamp, on behalf of the Crown, to the Companies Act of 1929, ss. 78, 264, which impose upon receivers the duty of paying out of assets coming to their hands in priority to any claim for principal or interest in respect of debentures all parochial or other local rates and all assessed taxes up to Apr. 5 next before the time when the receiver is appointed, and not exceeding in the whole one year's assessment. Those sections contemplate that a receiver appointed on behalf of the holders of the debentures of a company secured by a floating charge does in fact have coming into his hands the assets of the company, and that he is the person to pay any tax incurred by Apr. 5 next before his appointment and those sections are important in my view as showing that he is the person to pay that income tax and therefore, presumably,

the person who would be liable to pay income tax thereafter so long as he remained in his position as receiver ; and secondly, they recognise that all the assets of the company do come to his hands, and in my judgment the words "receiving income" in sched. D, miscellaneous rules, r. 1 mean receiving in fact the income. Mr. Burrows' argument, so far as I understood it, was that "income" in that rule meant the balance of profits and gains, and that the receiver in receiving the money of the company as it came in from time to time was not receiving the balance of profits and gains, and that therefore he was not the person who received within the meaning of that rule. But there appears to me to be nothing in that contention. The receiver in fact receives the proceeds of all the assets of the company, whether they are capital or whether they are income, and in receiving the proceeds of assets which are income assets he receives the income within the meaning of the rule. My attention was also drawn by Mr. Stamp to the All Schedules Rules, r. 15, which provides expressly that :

A receiver appointed by any court . . . shall be assessable and chargeable with tax in like manner and to the like amount as would be assessed and charged if the property were not under the direction and control of the court.

That rule appears to me to contemplate that a receiver other than a receiver appointed by the court would be assessed and charged in the ordinary course, being the person who received the income upon sched. D, miscellaneous rules, r. 1, and rule 15 is introduced for the purpose of providing that a receiver appointed by the court shall be assessed and charged in the same way, although being under the direction and control of the court he might be said not to be in receipt of the income. My attention was also drawn to the fact that the receiver is the occupier for the purpose of rating, and that on his appointment there is a change of occupation (*Richards v. Kidderminster Overseers* (2)). On behalf of the respondent it was contended that All Schedules Rules, rr. 4, 5 and 6, supported the argument of the respondent, but in my judgment, on the contrary, they operate in favour of the Crown's contention, and particularly, it seems to me, rule 5, which provides that a person not resident in the United Kingdom shall be assessable and chargeable in the name of his factor, agent, receiver or manager, whether such receiver has the receipt of the profits or gains or not ; that rule appears to me to be perfectly consistent with the view put forward by the Crown that the receiver in the ordinary course is the person who receives within the meaning of sched. D, miscellaneous rules, r. 1, but the assessment is to be made upon a receiver for a person not resident in the United Kingdom, although he does not fall within the latter rule. Mr. Burrows referred me to the case of *Inland Revenue Commissioners v. Paterson* (3), but that case appears to me not to assist his argument. It was not a decision that the insurance company did not receive the income of the

debtor ; it was simply a decision that notwithstanding the fact that the insurance company received the income of the debtor it did not cease to be her income because it was applied by her in part in discharge of her debt, which was part of the capital of the insurance company—a repayment of the capital which she owed to the insurance company. My attention was also drawn by Mr. Burrows to the case of *Gosling v. Gaskell* (4), and particularly to a quotation by LORD HALSBURY, L.C., at pp. 580 and 581, of what LORD CRANWORTH had said in the case of *Cox v. Hickman* (5), where he said, at pp. 306 and 307 :

It seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees ; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

What LORD CRANWORTH was there dealing with was the ultimate beneficial interest in the profits, and he was not considering the question of whether the person who actually received the income in the first instance was or was not the receiver, and that is clear from his use of the words, where he says that the debtor

receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts.

That is not to say that somebody else has not actually received the profits themselves. For these reasons, I am of opinion that the receiver in this case was a person who might be assessed under sched. D, miscellaneous rules, r. 1. As to the question of whether there has been a succession on the appointment of a receiver, I am not clear that that is a question of fact, and in my view there has been no succession in this case either on the appointment of the receiver as receiver for the first debenture holders or on the appointment of the receiver as receiver for the second debenture holders. It appears to me that the rule which indicates most clearly what a succession means within the meaning of the Income Tax Act, 1918, is sched. D, cases I and II, r. 9. That rule, in my opinion, contemplates that there must be a cessation of the trade which has been carried on and that somebody else must then succeed to that trade, and in my opinion the circumstances in which a receiver is appointed with power to carry on trade primarily in the interests of debenture holders but ultimately in the interests of the company whose trade it is, does not constitute the cessation of the carrying on of the trade and the succession

which is contemplated in rule 9. In my opinion, therefore, there is no succession in a case where a receiver is appointed in terms similar to the appointment of the receiver in this case either for the first debenture holders or for the second debenture holders. The case, I understand, will have to go back to the commissioners for the purpose of assessment. In view of the fact that on my view there has been no succession, I think I ought to make no order as to costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Hall, Brydon & Chapman* (for the respondents).

[Reported by LESLIE CARNEGIE, Esq., Barrister-at-Law.]

WARD v. TIBBATTS

[KING'S BENCH DIVISION (Singleton, J.), June 16, 1936.]

Limitation of Actions—Loan—Acknowledgment—Implication of promise to pay.

The plaintiff alleged that he made nine loans to the defendant over a period of six months in the years 1922, 1923. In respect of these an action was commenced on Oct. 10, 1935. The plaintiff relied upon an acknowledgment contained in a letter written on Oct. 31, 1929, which included the following: "I am sorry I cannot agree with L.'s inference that money was loaned to A. or to me. The cash I received from you was to enable me to accept the partnership arrangement in the farming venture and as you doubtless remember you arbitrarily dissolved the partnership. Any money I received from you was for expenses incurred on the trip. Your father, against my inclination, insisted on discussing the question and in definite terms advised me not to consider repayment. I told him that I regarded it as an obligation, and as soon as I was able to dispose of it I would do so. I am still of the same mind. As you probably realise I have only just returned to business and am, therefore, not in a position to make any definite promises. You may be assured that immediately I am able to, I shall commence reducing my obligation and I propose adding simple interest at 5 per cent. per annum until the whole amount is disposed of. I shall be glad to know that this is agreeable to you. I would like you to understand that this is entirely my affair and any money accruing to A. under her father's will, will not be accepted by me to benefit my financial position or obligation":—

HELD: this letter was not an acknowledgment of the debt. It was a mere admission of partnership agreement, under which there might be something due to the plaintiff. The letter contained no promise to pay.

EDITORIAL NOTE. Words referring to inability to pay at present and expressing a hope to pay in the future, must be accompanied by an unconditional acknowledgment of the debt if they are to be held to a sufficient acknowledgment to defeat a defence under the statute. The difficulty in the present case seems to be that the letter relied upon does not in terms refer to the debt sued upon, but rather to suggest that there is no such debt, though there may be an obligation of another nature.

AS TO ACKNOWLEDGMENTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 631-633, para. 801; and FOR CASES, see DIGEST, Vol. 32, pp. 362-367, Nos. 463-519.]

Cases referred to :

- (1) *Spencer v. Hemmerde*, [1922] 2 A.C. 507 ; 32 Digest 364, 484.
- (2) *Tanner v. Smart* (1827), 6 B. & C. 603 ; 32 Digest 364, 490.
- (3) *Green v. Humphreys* (1884), 26 Ch. D. 474 ; 32 Digest 361, 449.

ACTION to recover £996 9s. 6d., money lent. The defendant pleaded the Statute of Limitations, and against this defence an alleged acknowledgment in a letter by the defendant was set up. The facts and arguments fully appear from the judgment.

J. Alan Bell for the plaintiff.

Ifor B. Lloyd for the defendant.

SINGLETON, J. : The plaintiff Mr. C. Ward claims from the defendant the total sum of £996 9s. 6d. for money lent. The statement of claim shows that he alleges that there were nine advances altogether to the defendant, the first in 1922 and the last in 1923. It is to be observed that the advances extend over a period of six months and are nine in number, and were made many years ago. This action was commenced on Oct. 10, 1935. In the defence, para. 1 denies indebtedness ; para. 2 denies that the plaintiff lent the sum alleged ; para. 3 pleads the Statute of Limitations ; para. 4 denies any account stated which part of the claim has now disappeared. The plaintiff and defendant are brothers-in-law and at one time the defendant said that he was quite willing to have the matter investigated, but in view of his plea in para. 3 of the statement of claim, I think no good purpose would be served by an examination of the allegations which have been made on both sides because I think that the defendant succeeds on that plea. I am doubtful if, by putting in his answers to the plaintiffs' interrogatories in full, the defendant has destroyed his case, for he has alleged in his answers in respect of some of the moneys that they were not loans at all but moneys received by him in respect of a joint adventure with the plaintiff. Mr. Alan Bell, in opening told me frankly that he was faced with two difficulties, first, that the plaintiff was in South Africa, and, second, that I have to deal with the Statute of Limitations. I propose to deal only with the plea of the Statute of Limitations, which I think destroys the plaintiff's right to recover. The law has been argued and both parties say that everything is to be found in the speeches of the learned Lords of Appeal in the case of *Spencer v. Hemmerde* (1). The facts of that case were as follows : In 1915 a debtor, upon being pressed for payment of a loan granted to him in 1910 and interest thereon, wrote to the lender, in explanation of a former letter :

It is not that I won't pay you, but that I can't do so. . . . What I wrote was not that I saw no prospect at present of being able to repay the capital, but that I saw no prospect of being able to repay the capital at present.

The debtor never paid any part of the principal or interest. In answer to an action brought against him in 1920 for payment of the debt, the

debtor pleaded the Statute of Limitations. It was held that the letter was a sufficient acknowledgment to take the case out of the statute.

VISCOUNT CAVE, at pp. 511, 512, says :

the law relating to matters of this kind is not in doubt. The statute (21 Jac. 1, c. 16, s. 3) enacted that . . . "all actions of debt grounded upon any lending or contract without speciality . . . shall be commenced and sued . . . within six years next after the cause of such actions . . . and not after," and made no reference to any acknowledgment ; but it was held in a series of cases that a promise by the debtor to pay the debt, if given within six years before action brought, was sufficient to create a new contract and so to take the case out of the operation of the statute, the existing debt being a sufficient consideration to support the promise. It was also held that a simple acknowledgment of the debt, without any express promise, was sufficient for the purpose, an acknowledgment implying a promise to pay. Some of the earlier cases went so far as to decide that an acknowledgment was sufficient, though coupled with a promise to pay at some future time which had not arrived or upon some condition that had not been performed, or even with an absolute refusal to pay ; but this was set right by the decision of the Court of King's Bench in *Tanner v. Smart* (2), where LORD TENTERDEN, C.J., in giving the judgment of the court, said at p. 609 : "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied ; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule *expressum facit cessare tacitum* apply ? "

LORD SUMNER, at p. 532, reviewed some of the earlier authorities, and said this :

In the earlier case of *Green v. Humphreys* (3), COTTON, BOWEN and FRY, L.JJ., express a view which gets rid of the old difficulties and in my opinion ought to be adopted. COTTON, L.J., recites the familiar formula at p. 478 : "The rule seems to be this, that if there is an absolute unconditional acknowledgment, not controlled by any other language in the letter, then the court comes to the conclusion that by that acknowledgment the party intends a promise to pay that which he acknowledges to be due," and he concludes " . . . on a fair construction of the language there must be an acknowledgment of the claim as one which is to be paid by the writer." The judgments of BOWEN and FRY, L.JJ., are to the same effect. The former says at p. 479 : "It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment, a promise to pay will be inferred" ; and FRY, L.J., at p. 481 asks : "Now what is an acknowledgment ? In my view an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received. . . . In order to take the case out of the statute, there must upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt." All the Lords Justices, it will be seen, in stating the settled rule, direct their attention to the character of the words used and not to their effect as creating a new obligation. The result is that words will prevent or not prevent the operation of the statute according as they have or have not a promissory meaning, either expressly or by inference.

Those judgments, which have the express approval of LORD SUMNER, seem to me to give what is necessary of the true view of the case which I have to decide. At the end of his speech, LORD SUMNER said :

It is unnecessary for me to criticise the respondent's language word for word after what your Lordships have already said. It amounts, in my opinion, to the statement, "you affirm my continuing indebtedness, and I do not deny it; be it so. I am now without funds, but I do not exclude the possibility of paying at some time." The first words clearly acknowledge the debt; the latter neither deny it, nor negative the acknowledgment nor impose conditions on the liability. After all a liability is not nullified because the debtor has no means. He may be sued to judgment and made bankrupt or, at any rate, the simple contract debt may be merged in the specialty debt and given a prolonged lease of life, and I do not think it enough for the debtor to say, "when I can pay, who can tell?" to destroy the acknowledgment as a basis for the required promise. Had the debtor said, as Smart said, "I cannot pay the debt at present, but I will pay it as soon as I can," I suppose the result would have been otherwise, for on such nice distinctions do these things turn; but, as it is, I think the appeal succeeds and the judgment of BAILHACHE, J., should be restored.

In my view, applying the words I have read to the present case before me, the plaintiff has to prove (1) the debt and (2) the acknowledgment of that debt. He seeks to defeat the plea of the Statute of Limitations by reference to the letter of Oct. 31, 1929, written because of a letter of Sept. 23, 1929. The letter of Sept. 23 is written by the plaintiff's wife to Mrs. Tibbatts, the defendant's wife in these terms :

My dear Aileen, Not being certain of your address I am sending this c/o Barclays Bank and have asked them to kindly forward it on for me. Sorry to trouble you, but may Charlie and I please have back the money we lent you and Jack. Trusting you are keeping fit. All good wishes, yours affectionately, Lena.

I have not heard of any money lent by Mrs. Tibbatts to the plaintiff or by Mrs. Tibbatts to the plaintiff's wife. On Oct. 31, 1929, the defendant wrote the following letter to the plaintiff :

Dear Mac, Aileen has sent on to me Lena's letter of the 23rd ulto. regarding the money side of the New Zealand affair. I am sorry I cannot agree with Lena's inference that money was loaned to Aileen or to me. The cash I received from you was to enable me to accept the "partnership" arrangement in the farming venture and as you will doubtless remember you arbitrarily dissolved the partnership. Any money I received from you was for expenses incurred on the trip. Your father, against my inclination, insisted on discussing the question and in definite terms advised me not to consider repayment. I told him that I regarded it as an obligation, and as soon as I was able to dispose of it I would do so. I am still of the same mind. As you probably realise I have only just returned to business and am, therefore, not in a position to make any definite promises. You may be assured that immediately I am able to, I shall commence reducing my obligation, and I propose adding simple interest at 5 per cent. per annum until the whole amount is disposed of. I shall be glad to know that this is agreeable to you. I would like you to understand that this is entirely my affair and any money accruing to Aileen under her father's will, will not be accepted by me to benefit my financial position or obligation. I hope all is well with you and all at Kingston. Yours, Jack.

That letter is in answer to the letter written by Mrs. Ward. Mrs. Ward does not mention any specific debt or sum of money. She asks for "the money we lent you and Jack." In this case the plaintiff claims nine different sums of varying amounts amounting in all to £996 9s. 6d.. I find it difficult to say upon the correspondence that there is an acknowledgment of the debt. There is no admission of any money owing; there is, on the contrary, an express denial. The letter says:

The cash I received from you was to enable me to accept the "partnership" arrangement in the farming venture.

The letter is no more than an admission of fact of a partnership agreement and that there might be due something from the defendant to the plaintiff and that there might be a moral obligation to pay. I cannot see that there is an acknowledgment of this debt or an acknowledgment to pay at all. I am bound, therefore, to hold that the statute holds and there must be judgment for the defendant with costs.

Solicitors: *Meaby & Co.* (for the plaintiff); *Hughes, Hooker & Co.* (for the defendant).

[Reported by LESLIE CARNEGIE, Esq., Barrister-at-Law.]

GREAT WESTERN RAILWAY COMPANY *v.* HENRY R. JAMES AND SONS, LIMITED.

[COURT OF APPEAL (Lord Wright, M.R., Slesser and Romer, L.JJ.),
April 30, May 1, June 16, 1936.]

Railway—Rates—New exceptional rate—"Granted"—"Fixed" by Tribunal—Entered in rate book—Railways Act, 1921 (c. 55), s. 37.

A new exceptional rate within Railways Act, 1921, s. 37, requires to be "fixed," that is, sanctioned by the Railway Rates Tribunal under the above section and it also requires to be entered in the rate book of the company before it is "granted," that is to say, before it becomes operative as between the railway company and consignors of goods. Therefore where the tribunal fixed a rate of 10s. 9d., but the railway company entered in its rate book a rate of 14s. 9d. there was no effective exceptional rate granted, since neither rate was both sanctioned by the tribunal and entered in the rate book.

[EDITORIAL NOTE.] The point here is the construction of the Railways Act, 1921, s. 37, dealing with exceptional rates, i.e., rates more than 40 per cent. below the standard rate. The section is not very clear in its terms and the judgment of the Court of Appeal here clears up the ambiguity. It is essential in order that there may be a valid exceptional rate that it should be fixed by the tribunal and also entered in the rate book.

FOR EXCEPTIONAL RATES, see HALSBURY, 1st Edn., Vol. 23, Railways Supp. to paras. 1549-1551; and FOR THE RAILWAYS ACT, 1921, s. 37, see HALSBURY COMPLETE STATUTES OF ENGLAND, Vol. 14, p. 341.]

APPEAL from a judgment of PORTER, J., given on June 19, 1935. The

plaintiffs' claim was for £107 18s. 2d., balance of account due from the defendants for the carriage of goods by rail for the defendants.

Plaintiffs carried goods from Avonmouth to Birmingham and the question at issue was what was the legal rate or charge per ton for the carriage of such goods. By the Railways Act, 1921, s. 37, an exceptional rate more than 40 per cent. below the standard rate must receive the consent or sanction of the Railway Rates Tribunal. For the carriage of the goods in question from Avonmouth to Birmingham the tribunal had in 1929 and 1930 consented to or fixed a special rate of 10s. 9d. The standard rate was 28s. 1d. The railway company thereupon entered in their rate book at Avonmouth a rate for the journey as 14s. 9d., as to which 1s. 7d. was for delivery by road in Birmingham and balance of 13s. 2d. being for the sum mentioned in the judgment. The question at issue was whether the tribunal having fixed a rate of 10s. 9d., the company could regard that as the minimum charge which could be made and could fix a charge at a higher rate. The defendants pleaded that the rate chargeable was 10s. 9d., although that rate had never in fact been entered in the company's rate book. They also claimed a declaration that that charge was the correct one and that the entry of the rate of 14s. 9d. in the rate book was illegal and *ultra vires* and that the alleged contract with them created by such entry and the acceptance of their goods for carriage between the stated points was illegal and void. PORTER, J., dismissed the action, but granted the declarations establishing the defendants' right to a special rate of 10s. 9d. The railway company, the plaintiffs, appealed.

Walter T. Monckton, K.C., Alfred Tylor, and David L. M. Renton for the appellants.

Sir Stafford Cripps, K.C., and Lionel F. Heald for the respondents.

SLESSER, L.J. : ROMER, L.J. will read the judgment of the court.

ROMER, L.J. : This is an appeal from a judgment of PORTER, J., pronounced in an action brought by the Great Western Railway Company against two companies trading together in partnership under the firm name of James & Hodder, the dispute between the parties being one as to the rates payable by the defendants for the carriage of certain of their goods over the plaintiffs' railway between Avonmouth Docks and Birmingham. The circumstances in which the dispute has arisen are set forth in detail in the judgment of the learned judge. But for the purposes of the present appeal they may be stated as follows : By the Railways Act, 1921, s. 32, it is enacted, so far as is material for the present purpose, that on and from the appointed day the standard charges as there defined shall be the charges which a railway company shall be entitled to make for all services rendered in respect of which such charges are fixed, and that no variation, either upwards or downwards, shall be made from such charges unless by way of an exceptional

rate continued, granted or fixed under the provisions of part III of the Act. It is alleged by the plaintiffs that the defendants, in respect of the carriage by the plaintiffs between Avonmouth Docks and Birmingham of the goods in question, are liable to pay an exceptional rate of 13s. 2d., the standard charge for such services being 28s. 1d. The defendants contend that they are only liable to pay (as indeed they have in fact paid) an exceptional rate of 10s. 9d. In the action the plaintiffs seek to recover from the defendants the difference between these two alleged exceptional rates. The question, therefore, to be determined in the action is whether the plaintiffs have "granted" an exceptional rate of 13s. 2d. within the meaning of sect. 32, it not being suggested that such rate was a "continued" rate or a "fixed" rate within the meaning of the section. If they have not granted such a rate the plaintiffs admit that the action was properly dismissed by PORTER, J. But the defendants by a counterclaim seek, and have obtained from PORTER, J., declarations establishing their right to have the like services rendered to them at the exceptional rate of 10s. 9d. The question to be determined on the counterclaim, therefore, is whether the plaintiffs have granted an exceptional rate of 10s. 9d. within the meaning of the section.

It is plain that when once an exceptional rate has been granted it takes the place of the standard charge and, until cancelled or altered in accordance with the provisions of the Act, is the only charge which the company is entitled to make for services to which the rate applies. The Act, however, contains no definition of the word "granted," and its meaning must be ascertained from a consideration of the sections of the Act that are grouped together under the heading "exceptional charges." We cannot find anything in any other part of the Act that throws any light upon the matter. The sections in question are 36 to 41 inclusive. The first of these sections is concerned solely with exceptional rates in operation immediately before the appointed day and need not be considered further. It gives no help towards ascertaining the meaning of the word granted. But the other sections are of importance. It is not necessary to read them at length. It will be sufficient to state the conclusions to which we think they lead.

In the first place it seems clear that "granted" must mean granted by the company. The Rates Tribunal may at the instance of a trader "fix" a new exceptional rate: sect. 37 (3); it may give its "consent" (in which case, in our opinion, it gives its "sanction") to a new exceptional rate that is less than 5 per cent. or more than 40 per cent. below the standard rate: sect. 37 (2). But no one is treated or referred to in the sections as "granting" an exceptional rate other than the company. Secondly, where the exceptional rate is neither less than the 5 per cent., nor more than the 40 per cent., the company may grant it without obtaining anybody's consent, but in such case must, within a certain period

of time, report the rate to the minister: sect. 37 (1). The subsection does not state in terms the time from which the period is to run, but it would seem clear that it runs as from the grant being made. Compare this with sect. 41 (1) which deals with exceptional fares. Under that subsection the company may "charge" fares below the standard fares in such cases as the company may think fit, but the particular circumstances and the amount of the reduction must be reported to the Minister within a certain period after the decision has been arrived at. Now it is obviously possible that in some cases the exceptional fares may be "charged" before even the report is made to the minister, so that in the case of exceptional fares at any rate, the legislature would not appear to have seen any objection to such fares being charged before the Minister had had an opportunity of considering them. Then there is this further observation to be made about sect. 41. By subsect. (2) it is provided that, if the Minister is of opinion that the company have granted exceptional fares in the manner therein referred to, he may refer the matter to the tribunal who may cancel or modify the exceptional fares so granted. Now the company is not in terms given any power by the Act to "grant" exceptional fares. The only power is to "charge" them. In this section, therefore, the words "grant" and "charge" are used as meaning the same thing, so that *prima facie* the word "grant" in sect. 37 (1) means "charge." By "charge" we understand to be meant "put in operation" and that, in the case of a rate, would happen when the rate was entered in the rate book. This conclusion is, we think, justified by the following considerations. Sect. 37 (1) provides that certain exceptional rates shall not be granted without the consent of the Rates Tribunal. We do not understand how the word "granted" as here used can mean anything other than "put into operation." Then again sect. 37 (2) provides that if the Minister is of opinion that a company is granting new exceptional rates in such manner as prejudicially to affect any class of users of the railway not benefited by such rates, he may refer the matter to the Rates Tribunal. "Granting" in this connection cannot mean having power to charge or proposing to charge. No user of the railway could be prejudicially affected by a power or proposal never carried into effect.

It is further to be noticed that in sect. 40 (3), which is the section which deals with the disintegration of exceptional rates, there is to be found this phrase:

Where any company in granting such an exceptional rate has not distinguished in the quotation for the rate or in the rate book, . . .

This strongly suggests that the granting of the exceptional rate and its entry in the rate book take place simultaneously. If this be not so it is difficult to say at what earlier time an exceptional rate comes into

force in those cases where the rate may be granted without obtaining the consent of the Rates Tribunal. The mere determination of the board of a railway company to grant an exceptional rate uncommunicated to the public in any way cannot surely be binding either on the public or the railway company. Directly it is published in the rate book it can properly be considered as an intimation to the public that in future the goods in question will be carried at such rate instead of at the standard rate, and the rate thereupon becomes binding upon all parties until cancelled or modified under the provisions of the Act. If this be so in the case of an exceptional rate that does not require the consent of the Rates Tribunal, we cannot think that a different result obtains where such consent is necessary. The insertion of such a rate in the rate book will bring the rate into force if the consent has been obtained. If the consent has not been obtained its insertion in the rate book will be a mere nullity.

Applying these considerations to the facts of the present case, it seems clear that the plaintiffs have never validly granted the rate of 13s. 2d. It is no doubt entered in the rate book, being part of the rate of 14s. 9d. specified in the extracts supplied to us from the Bristol rate book kept at Avonmouth Dock in respect of carriage of copper, cast, etc., between what is there called the Bristol Port Group and Birmingham. But it is more than 40 per cent. lower than the corresponding standard charge and could not, therefore, be granted without the consent of the Railway Rates Tribunal. That consent has never been obtained. The fact that the consent of the tribunal has been given to a rate of 10s. 9d. is, in our judgment, beside the mark. The tribunal had no power, nor indeed did it purport, to give the plaintiffs a general dispensation from the limitation of 40 per cent. imposed by sect. 37 (1). It merely sanctioned a particular exceptional rate of 10s. 9d., and it by no means follows that it would have sanctioned one of 13s. 2d. In our opinion, therefore, PORTER, J., was right in dismissing the plaintiffs' action. But we think that the defendants were not entitled to the declarations establishing their right to the exceptional rate of 10s. 9d. That rate, though sanctioned by the tribunal, was never entered in the plaintiffs' rate book or otherwise put into force, and was therefore never granted within the meaning of sect. 32.

In our opinion the appeal succeeds to the extent that the judgment of the court below should be varied by omitting the declarations and by entering judgment for the plaintiffs on the counterclaim with costs. In all other respects the appeal fails and must be dismissed. In the circumstances we make no order as to the costs of the appeal.

Solicitors: *A. G. Hubbard* (for the appellants); *Hancock & Willis*, agents for *Barry & Harris*, Bristol (for the respondents).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

McMANUS v. BOWES AND OTHERS.

[KING'S BENCH DIVISION (Macnaghten, J.), May 11, 12, 13, 19, 1936.]

Lunatics—County mental hospital—Officers—Dismissal—Notice—Lunacy Act 1890 (c. 5), s. 276—Superannuation—Return of payments—Asylums Officers' Superannuation Act, 1909 (c. 48).

A county mental hospital was maintained by a joint visiting committee under the Lunacy Act, 1890. This committee engaged the plaintiff as assistant medical officer, but no terms as to the termination of the appointment were settled. Friction arose between the plaintiff and the superintendent of the hospital and the committee dismissed the plaintiff with three months' salary in lieu of notice, not for misconduct but on the ground that his retention on the staff was not in the interests of the hospital. Sect. 276 of the Act empowers a visiting committee to remove any person appointed under the section. The plaintiff had been paying contributions towards a superannuation fund under the Asylums Officers' Superannuation Act, 1909. For some years he had been claiming a superannuation allowance, and the Secretary of State had decided the claim against him in 1930. The plaintiff claimed, *inter alia* (i) damages for wrongful dismissal and arrears of salary; (ii) the repayment of his contributions to the superannuation fund. He at first claimed also a superannuation allowance, but withdrew the claim, with others, during the trial:—

HELD: (i) the committee was entitled to dismiss the plaintiff at its pleasure, and, as no period of notice had been agreed, without notice.

(ii) as the plaintiff had claimed a superannuation allowance in the action, he could not have an order for the return of his contributions, for the Asylums Officers' Superannuation Act, 1909, s. 10 (1) allows their return only to an officer who "has not become entitled" to an allowance.

(iii) the claim for return of contributions was not barred by the Public Authorities Protection Act, 1893, because although the Secretary of State had given a decision, which, under the 1909 Act was final, there was still a right of recourse to the court.

[EDITORIAL NOTE.] The case of *Brown v. Dagenham U.C.* (1) dealt with the position of Local Government officers as to notice of dismissal under the Public Health Act, 1875, and the Local Government Act, 1894. The present case turns upon the Lunacy Act, 1890, s. 276, and, though the words of that section are not the same, they are held to have the same effect. The position has been slightly changed by the enactment of the Local Government Act, 1933, s. 121 (1), but no question of the effect of that section arises here. The question upon the return of superannuation payments is also a new one and of great interest as it not only deals with the right to recover and liability of particular authorities to repay, but also with technical matters of pleading and limitation arising upon such a claim being made.

AS TO DISMISSAL UNDER THE LUNACY ACT, 1890, s. 276, see HALSBURY, Hailsham Edn., Vol. 21, p. 393, para. 675, and FOR THE SECTION, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 111. AS TO SUPERANNUATION see HALSBURY, Hailsham Edn., Vol. 21, p. 393, note (t) and FOR THE ASYLUMS OFFICERS' SUPERANNUATION ACT, 1909, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 152.]

Case referred to :

(1) *Brown v. Dagenham Urban Council*, [1929] 1 K.B. 737; Digest Supp.

ACTION by a former mental hospital officer against the superintendent of the hospital, the members of two visiting committees and their clerks, for (i) damages for conspiracy, libel, slander, negligence, conversion, wrongful dismissal and breach of contract; (ii) an order for payment of arrears of salary and emoluments; (iii) superannuation allowance under the Asylums Officers' Superannuation Act, 1909, and/or the return of the contributions made under that Act.

After a three-days' hearing all the claims were withdrawn except those for (i) wrongful dismissal, and (ii) repayment of the contributions to the superannuation fund. Of these only the first needed a jury. The learned judge, with the consent of counsel, discharged the jury which had heard the evidence in support of the allegations which had been afterwards withdrawn, considering that they could not be expected properly to weigh evidence of wrongful dismissal with their minds burdened with the abortive evidence concerning the abandoned claims. On the morning on which the fresh jury should have been empanelled, the plaintiff was absent through illness. The learned judge accordingly heard legal argument on the question of whether the plaintiff was entitled to notice at all, for if it appeared that he was not, there would then be no case to go before a jury. Counsel accordingly argued this question and also that of whether the plaintiff was entitled to superannuation allowance and/or the return of his contributions. These arguments, and the relevant pleadings and facts, are set out in the judgment.

Serjeant Sullivan, K.C., and Gerald Gardiner for the plaintiff.

R. P. Croom-Johnson, K.C., W. Blake Odgers and B. A. Harwood for the Hampshire Joint Mental Hospital Committee, the only defendants remaining in the action.

MACNAGHTEN, J.: In this action the plaintiff, Dr. Hugh Charles McManus, who was one of the resident medical officers at the Park Prewett Asylum (an asylum maintained by the Hampshire Joint Mental Hospitals Visiting Committee) sued a number of defendants for the purpose of obtaining a variety of remedies. He had occupied the position of medical officer at that asylum from June 1, 1923, until Oct. 21, 1927, and he issued his writ against the defendants within six years of the termination of his employment, on Oct. 20, 1933. The defendants whom he sued were Dr. Bowes (who during the period of the plaintiff's employment at the asylum was the superintendent of the asylum), the late Duke of Wellington, Major Chute and a Mrs. Maddocks (who were members of a sub-committee entrusted with the charge of the Park Prewett Asylum), a Mr. Spooner, who was the clerk to the visiting committee of that asylum, and a Mr. Barber, who was clerk to the visiting committee of the Hampshire Joint Mental Hospitals Committee.

He sued those two last-named gentlemen, Mr. Spooner and Mr. Barber, in their personal capacity and also as the representatives of the visiting committees of which they were respectively clerks. The Lunacy Act, 1890, which provides for the constitution of these visiting committees, enables the visiting committees to sue and be sued in the name of their clerks; so these two gentlemen were sued both in their own names personally and also in their representative capacity.

The statement of claim was delivered on Nov. 21, 1933, the writ having been issued on Oct. 20, 1933. By his statement of claim the plaintiff made a number of claims against these defendants. Against all the defendants and against each of them jointly or, alternatively, severally, he claimed damages for conspiracy, damages for libel, damages for slander, damages for negligence and damages for conversion of certain property; against the defendant committees jointly or, alternatively, severally he claimed that he had never been validly dismissed and that his employment was never validly determined; he claimed an order for payment of arrears of salary and emoluments which he alleged were due to him, further or alternatively damages for wrongful dismissal, further or alternatively damages for breach of contract, further or alternatively that the defendants were bound to pay him a superannuation allowance under the Asylums Officers' Superannuation Act, 1909; an order for payment of the amount of the allowance that was due to him, further or alternatively a declaration that the defendants were bound to repay to him the aggregate amount of his contributions under that Act, and an order for the payment of the amount so due; against the first-named defendant Dr. Bowes, damages for wrongfully procuring or inducing the defendants or one of them to commit breaches of contract with the plaintiff.

The case was tried before me with a special jury. The plaintiff's case was fully heard; he was called as a witness on his own behalf, and three other members of the staff at the Park Prewett Asylum at the time when his services terminated in Oct., 1927, were also called in support of his case. At the conclusion of the plaintiff's case Serjeant Sullivan, appearing on his behalf, very properly withdrew from the consideration of the jury all the claims alleged in the statement of claim except the claim for damages for wrongful dismissal and the claim for the repayment of contributions which the plaintiff had made under the Asylums Officers' Superannuation Act, 1909, with the result that the evidence which the defendants were prepared to place before the court in answer to the charges made against them was not heard. The fact that these claims were withdrawn is, of course, sufficient of itself to show that they were unfounded; but, in view of the publicity which the case has received, it is, I think, right to say that there was no evidence at all in support of the allegations of conspiracy, defamation or negligence

which had been made—and, I regret to say, made recklessly—by the plaintiff.

After the withdrawal of all these claims there remained but two matters for further consideration by the court. One was the claim for damages for wrongful dismissal, and the other was the claim for repayment of the contributions which the plaintiff had made under the Asylums Officers' Superannuation Act, 1909. The latter claim was a matter which did not require the assistance of a jury: there were no questions of fact with regard to that; it was purely a question of the true construction of that Act and of the plaintiff's rights under it. The question whether he had a claim for damages for wrongful dismissal was a question which in a certain event should be submitted to the jury. The case was tried before the jury on Monday, Tuesday and Wednesday of last week, and the question whether the plaintiff had been wrongfully dismissed was in no way concerned with the matters which had been placed before the jury during those three days in relation to the various other claims which had been withdrawn. It seemed to me that it would be difficult for the jury to discharge from their minds the evidence heard with regard to these matters on the one side only, and that it would be unsatisfactory that they should be called upon to deliver a verdict on the issue of wrongful dismissal with their minds still retaining evidence to which it had not been possible for the defendants to give any answer. Accordingly, with the consent of counsel, I discharged that jury with a view to the trial by a fresh jury this week of the simple question whether the plaintiff was wrongfully dismissed. Today was fixed for the trial of that issue before the jury. Unfortunately, the plaintiff was taken ill last week and, although it was expected that he would be well enough to attend today, unfortunately his state of health is such that he could not attend and give evidence on this issue on his own behalf.

The question whether he had been wrongfully dismissed was a very simple question. It was not disputed that the visiting committee were entitled to dispense with his services. When they dismissed him on Oct. 21, 1927, they had in fact paid him his salary up to that date and the salary to which he was entitled if he had continued in the service of the visiting committee for a period of a further three months. The simple question was this: assuming that the plaintiff was entitled to reasonable notice of the termination of his employment, was a period of three months in the circumstances of the case an adequate period of notice? But that question was subject to a further question as to whether the plaintiff was in law entitled to any notice at all, a question of law which was to be argued before me, and the only object of taking the verdict of the jury on the question was that, in the event of the jury deciding that the plaintiff was entitled to a longer period of notice and in the event of the court deciding that he was not entitled to any notice,

there would then be a verdict of the jury which in the event of an appeal would enable the Court of Appeal to dispose of the action without ordering a new trial. In those circumstances it seemed to me convenient this morning, when it was impossible to try the issue before the jury, to hear the question of law fully argued and to give my decision on the point as to whether in law the plaintiff was entitled to any notice at all. If he be entitled to notice, then this question of whether three months was an adequate notice must be determined by a jury; if, on the other hand, he is not in my opinion entitled to notice, then my decision today determines the whole of the action, subject, of course, to the right of either party to appeal if they are dissatisfied with the decision of this court.

I propose, therefore, to deal with these two claims which still remain out of the number of claims that were made in the statement of claim, and to deal with them separately. The plaintiff, as I have said, entered on his duties as second assistant medical officer of the Hampshire Joint Mental Hospitals Visiting Committee on June 1, 1923. This visiting committee is constituted under the Lunacy Act, 1890; it is a joint committee of the Hampshire County Council, of the Council of the County Borough of Southampton, and of the Council of the County Borough of Bournemouth, those two county boroughs being within the ambit of the County of Hampshire although, by reason of the fact that they are county boroughs, no longer part or parcel of that county. Under the Lunacy Act this joint visiting committee have power to constitute sub-committees for the purpose of dealing with their various hospitals or asylums. They had an asylum at a place called Knowle in the county, and they also at the material time had this Park Prewett Mental Hospital, which is situated about a mile and a half from Basingstoke. The three defendants, the late Duke of Wellington, Major Chute and Mrs. Maddocks, were members of the Park Prewett Visiting Committee; the Duke of Wellington was a member of the joint committee of all the Hampshire Mental Hospitals, and Major Chute, I think, was also a member of the joint visiting committee.

It was in June, 1923, that Dr. McManus was engaged. The hospital, which was a very large building capable, as I was told, of accommodating no less than 1,400 persons of unsound mind, was constructed before the War but was not used as an asylum until 1919. During the War it was used as a hospital for His Majesty's Canadian Forces, and it was not until the summer of 1919 that the visiting committee obtained possession of it and began to use it for the purposes for which it had been designed. Dr. Bowes in July of 1919 was appointed as the medical superintendent at a salary of £1,000 a year, with a house and allowances, and the terms of his engagement provided that the employment might be determined by a three months' notice on either side. Some eighteen months later

the sub-committees, one for the Knowle Hospital and the other for the Park Prewett Hospital, were constituted under the Lunacy Act, 1890, s. 139, and it was in June, 1923 that Dr. McManus was engaged as second assistant medical officer at a salary of £400 a year with emoluments which were valued at £150 a year. This was not the first time that Dr. McManus had been medical officer at a lunatic asylum. In 1904 he had been assistant medical officer and during 1905 he was the senior resident medical officer at the Bagthorpe Infirmary, and from June 14, 1906, until Aug. 31, 1922, he was assistant medical officer at the Lancaster County Mental Hospital, and for some period, about four years, during that time he was seconded for service with His Majesty's military forces; he went away with His Majesty's Expeditionary Force which was sent to Russia. The termination of his services with the Lancaster Visiting Committee, so it was given in evidence, was due to some dispute and the matter was investigated and his dismissal from that employment was upheld. He had in fact been dismissed by a three months' notice which was, I understand, part of the terms of his employment there.

From the time of his leaving the employment of the Lancaster Visiting Committee he was altogether unemployed until in 1923 he obtained employment under the Park Prewett Visiting Committee. He was engaged in fact by Dr. Bowes on the recommendation of Sir Hubert Bond, who is one of the commissioners of the board of control, and the appointment was confirmed by the committee of the Park Prewett Hospital on June 14, 1923, when it was reported to the committee:

That Dr. H. C. McManus had been engaged as second assistant medical officer and the appointment was confirmed at a salary of £400 per annum with emoluments valued at £150 per annum.

According to the evidence given by Dr. McManus himself, neither at the time of his engagement by Dr. Bowes nor on any other occasion was any mention made of the terms with regard to notice upon which Dr. McManus was engaged. The minute of the committee which I have read is also silent on that subject. Dr. McManus, as I have said, gave evidence on his own behalf; and, in view of the fact that he made a large number of unfounded charges against a number of people, it is only fair to say that he gave his evidence in a restrained and a careful manner, and I have no doubt that he was giving evidence which he himself believed to be true; although, in view of the admitted facts of the case, it is hardly possible for anyone to place much reliance upon his present recollection of events which took place so long ago when he was in the service of the Park Prewett Visiting Committee and when, according to the admitted evidence, he himself was suffering from a state of nerves which would make it difficult for him to appreciate exactly what was the position of affairs or what was the attitude which other persons

were taking towards him. I say he gave his evidence in a restrained and careful manner, and there is no dispute that he was a gentleman very well qualified to perform the duties which he had undertaken and that he was zealous in the discharge of those duties. In the year following his appointment he obtained the Diploma of Psychological Medicine, which is a qualification to which the Board of Control attach importance. In 1925 his salary was raised from £400 to £425, and in Aug., 1926, he was appointed pathologist to the hospital at an additional salary of £75, making his total salary £500 a year.

In November of that year he had a nervous breakdown of such a character that he had to remain in bed. He complained that he was not treated by his colleagues with the sympathy and consideration which he might have expected to receive. It was suggested in cross-examination—whether the suggestion was well-founded, of course, cannot be known—that, so far from that being the case, he was in such a state of nerves that he was unwilling to see them. But he was induced to leave the hospital, and did not return to it until the end of Jan., 1927. As to what happened after his return there is no evidence except that which he himself gives and that given by the three members of the staff who were with him discharged in October of that year, but it was admitted that by October the position of affairs at the hospital was such that it was extremely unsatisfactory. It was admitted that Dr. Bowes, the superintendent, Dr. McManus, the resident medical officer, to whom the women's section of the hospital was allotted, and the matron of that part of the hospital, were all three in a condition bordering on complete nervous breakdown. The state of affairs can be gathered from the fact that when on Friday, Oct. 21, the sub-committee, to whom the visiting committee of the Park Prewett Hospital had entrusted the duty of dealing with the situation, came to the conclusion that in the interests of the hospital it was necessary to discharge Dr. McManus and to suspend him from any further duties at the hospital, with the knowledge and approval of the matron no less than 85 out of the 90 nurses allocated to that part of the hospital not only sent in a petition—I gather, a petition in favour of the plaintiff—but at the same time they, being engaged upon a weekly engagement, sent in notices of resignation terminating at the end of the next week. Fortunately, the visiting committee apparently dealt with that situation with promptness and vigour. A responsible member of the visiting committee came to the hospital and spoke to the nurses, whereupon most of them recognised what a grave dereliction from duty they had committed and withdrew their resignations. The matter was overlooked by the visiting committee except, of course, in the case of the matron and the sisters, who had aided and abetted the nurses in taking that course.

As I have said, on Friday, Oct. 21, the sub-committee, of which the

late Duke of Wellington was chairman, called upon Dr. McManus to attend before them. On the previous day Dr. McManus had written to the Duke of Wellington and had asked to see him. He had written on Oct. 20 :

My Lord Duke, I am writing to ask if you will grant me the privilege of a private interview at an early date. I have communicated my wish to Dr. Bowes and he agrees. I am, Your Grace's obedient servant, H. C. McManus.

Accordingly, when Dr. McManus attended before the committee on the following day, Oct. 21, the Duke of Wellington told him that he could not hear a communication private to himself but that the sub-committee were ready to hear anything that he might wish to say to them with regard to himself or with regard to the affairs of the hospital. Dr. McManus declined that invitation, and the sub-committee came to the conclusion that the interests of the hospital required that Dr. McManus should no longer be in their service, and Mr. Spooner, clerk to the committee, by their instructions, addressed this letter to Dr. McManus, dated Oct. 21, 1927 :

Sir, I am instructed by the special sub-committee, appointed with full power to act by the Park Prewett Mental Hospital Committee, to give you three months' notice of termination of your services, as they consider that your retention on the staff is not in the interests of the institution. I am further instructed to give you notice of suspension forthwith from your duties at this hospital. Further, I am instructed to say that the committee require you to depart from this institution on Saturday, Oct. 22, 1927, but they are prepared to give you opportunities for the packing and removal of your effects at any reasonable times on communication with me. I enclose herewith cheque for your salary up to and including today with full pay and value of emoluments for three months. I am, Yours faithfully, H. Spooner, clerk to the committee.

Pursuant to that letter Dr. McManus left the Park Prewett Hospital on the following day, Saturday Oct. 22. The long delay in raising any complaint that the period of three months was not in the circumstances a reasonable period for notice terminating his employment is, I gather, explained by the fact that Dr. McManus was not well and also that he was engaged in putting forward a claim to superannuation allowance or pension under the Act of 1909, to which I have already referred. But whether that be so or not, he did on Oct. 20, 1933, just within the period of six years fixed by the Limitation Act of 1623 for bringing certain claims, issue the writ in this action.

Apart from the issue whether, assuming that Dr. McManus was entitled to a notice to determine his services, the period of three months was a reasonable notice, there was the question raised by the defendants, the joint visiting committee (for it is the joint visiting committee who alone are left as defendants in the action) that Dr. McManus was not entitled to any notice at all. That depends upon the true construction

of the Lunacy Act, 1890, s. 276. That section provides that the visiting committee of every asylum shall appoint a chaplain, a medical officer who shall reside in the asylum, a superintendent of the asylum, a clerk, a treasurer and such other officers and servants as they think fit. Sect. 276 (3) says :

The committee may remove any person appointed under this section, and if the office of chaplain, medical officer, superintendent, clerk, or treasurer becomes vacant, the committee shall appoint a person to fill the vacancy subject to the restrictions affecting the original appointment, and they may in their discretion fill any vacancies among other officers and servants of the asylum.

It is argued on behalf of the defendant committee that that section, while it requires the visiting committee to appoint the various officers named in it, gives them power to remove any person so appointed, and by that is meant that they can, in their discretion, at their pleasure and without assigning any reason for their action, revoke the appointment and remove the person from the office to which he was appointed ; and of course, if he is removed from his office, he can no longer draw the emoluments of the office. It is known that in former times the judges of superior courts of common law, with the exception of the Court of Exchequer, were appointed by His Majesty during his pleasure, like most of the other servants of the Crown ; and in the Stuart period the King could remove a judge as he could remove any other servant. It was not so in the case of the Barons of the Exchequer, and it was Charles I who sought to remove the Chief Baron, but the Chief Baron replied that his patent was a patent to hold the office during good behaviour and that he could not be removed from the office unless he misbehaved. Charles I was bound to give way to that plea, and, as in those days His Majesty could forbid the Chief Baron from sitting in court, the Chief Baron in question never did sit again in the Court of Exchequer, but, as he still held the office of Chief Baron, he continued until his death to draw the emoluments of the office. If a person is removed from an office he loses the salary or emoluments of the office, but if he cannot be removed, then he is entitled to keep the emoluments which attach to the office. The expression in sect. 276 that " the committee may remove any person appointed " seems necessarily to imply that when he is removed, then he no longer has any right to the salary or emoluments which are attached to that office.

It is argued that that was the position which Dr. McManus in fact occupied, and it is said that in this matter I am bound by the decision of McCARDIE, J., following other decisions, in the case of *Brown v. Dagenham Urban Council* (1). That was a case where an officer of the Urban Council was dismissed. He held two appointments, one an appointment under the Public Health Act, 1875, and the other under the Local Government Act, 1894. There is a difference in the

language of those two Acts in that, whereas the Act of 1875 speaks of the officer appointed by the local authority holding office during the pleasure of the council, the latter Act speaks of the office of assistant overseer, the officer in question, being an office which the local authority might revoke. Mr. Croom-Johnson has argued that there is really no distinction to be drawn between the words "revoke" and "remove." I think that that argument is well-founded; indeed, it is conceded that unless some such meaning is attached to sect. 276 (3) the words "the committee may remove any person appointed under this section" are otiose, because any employer, be it a visiting committee or a local authority, must be entitled to dismiss his employee. Of course he may always dismiss him for misconduct justifying dismissal. What is misconduct justifying dismissal of course varies in different cases. Unless some meaning such as that contended for is given to the words, they seem to me to have no force at all. It is also to be observed in this case that nothing was said at all about the notice to be given in the event of the services being terminated. I think that in those circumstances, nothing being said, it must be taken that Dr. McManus was employed upon the terms that the committee might remove him at their pleasure and that he could have no claim against them if they told him to go without more ado. In my view, therefore, the claim for damages for wrongful dismissal fails and must be dismissed.

There only remains this claim for the return of the contributions under the Asylums Officers' Superannuation Act, 1909. As that involves the construction of an Act of Parliament, it is perhaps not surprising that it gives rise to considerable difficulty. Indeed, the true construction of the Asylums Officers' Superannuation Act, 1909, is in every respect far from easy. This claim arises under sect. 10 of that Act. The Act deals with superannuation allowances to officers and servants employed in public asylums for the insane in Great Britain and Ireland, and it begins by dividing them into two classes, the first class and the second class. It is not disputed that Dr. McManus belongs to the first class. It provides by sect. 2 that an officer of the first class shall, subject to certain conditions, be entitled to a superannuation allowance to be paid in the manner therein described. Sect. 3 deals further with the granting of superannuation allowances. Sect. 4 provides for the granting of gratuities as distinguished from superannuation allowances in certain cases. Sect. 6 deals with how you are to reckon the period of service. It is suggested (and the suggestion seems to be well-founded) that obviously there has been some blunder in the drafting of that section. Sect. 7 deals with the cases where an officer has got a superannuation allowance and then gets some further employment. Then come sects. 8, 9 and 10, which deal with the matter now in hand, namely, contributions made by the officers to the fund out of which the

superannuation allowance is to be paid. Every officer is bound by the Act to contribute annually for the purposes of the Act a percentage amount of his salary, and the amount is to be deducted from the salary payable to him and is to be carried to and form part of the fund from which the superannuation allowances are to be paid. Sect. 9 deals with the scale of contributions. Then we come to sect. 10, under which this claim is made. Sect. 10 (1) provides :

An established officer or servant who has not become entitled to a superannuation allowance, and who loses his office or employment by reason of reduction of staff, or of any other cause whatever other than his own misconduct or voluntary resignation—

in this case Dr. McManus did not resign, nor did he lose his office for misconduct. It was made perfectly clear during the course of the case that the visiting committee make no charge of misconduct against Dr. McManus, but they were satisfied that in the interests of the hospital it was necessary to terminate his services. Any officer who has those qualifications, that is to say, who has not become entitled to a superannuation allowance and who loses his office in the way in which Dr. McManus lost his, namely, by dismissal but not for misconduct—

shall be entitled to receive the aggregate amount of his contributions under this Act.

It does not say from whom he is to receive them, but *prima facie* he would seem to be entitled to receive them from the visiting committee that had deducted them. Nor does it say when he is to receive this aggregate amount of his contributions. Dr. McManus was previously in the employment of the visiting committee of the County of Lancaster, and a sum of money, about £158, during his period of service with them was deducted under sect. 8 of this Act. Serjeant Sullivan suggested that the Hampshire visiting committee were liable to pay to Dr. McManus not only the sum which they, the Hampshire visiting committee, had deducted but also the amount which the visiting committee of Lancaster had deducted. I see no ground at all for that contention. The section does not say expressly from whom he is to be entitled to receive it, but *prima facie* I think he is entitled to receive the amount of his contributions from the visiting committee which deducted them. It is quite true that where a superannuation allowance is granted, that superannuation allowance has to be paid by the visiting committee by which the annuitant or pensioner was last employed, and then that visiting committee can get contributions from the visiting committees with whom he had been previously employed, subject of course to the provisions of this Act ; but there is no such provision with regard to the return of these contributions. In my opinion that section means that he is entitled to get the aggregate amount of his contributions from the visiting

committee which in fact deducted them. That means that in this case he was entitled, on fulfilling the conditions set out in sect. 10, to get from the joint visiting committee sued in this action the aggregate amount deducted by them.

Then comes the question, when is he entitled to receive them? The Act does not say, but he is only entitled to get them if he does not become entitled to a superannuation allowance, and so long as the question whether he is entitled to a superannuation allowance is pending, obviously the visiting committee cannot repay to him the amount of his contributions; they are bound to keep those contributions in the fund from which the superannuation allowance will, if he is entitled to it, be paid. In this case, apparently, the plaintiff for some years was prosecuting his claim for a superannuation allowance. Under the Act any question of dispute is referred to the Secretary of State; the Secretary of State has to decide upon the matter, and his decision is declared by the Act to be final. It is common ground that the matter of the claim of Dr. McManus did go to the Secretary of State, and I think I was told that as long ago as 1930 the Secretary of State gave his decision adverse to the claim. Nevertheless, by the writ in this action and by the statement of claim the plaintiff claimed that he was entitled to a superannuation allowance under the Act. The defendants set up the plea that the matter had been determined by the Secretary of State and that that decision was final. Nevertheless, the plaintiff did not withdraw the claim but persisted in it, and it was not, I think, until the fourth day of the trial before me that the claim was withdrawn. Accordingly, it being withdrawn, it will stand dismissed by the judgment in this action. The defendant joint committee could not properly repay these contributions so long as the question of the right to a superannuation allowance was pending. It is the fact that the plaintiff and his advisers, after a further consideration of the matter which no doubt has recently been given to it, are satisfied that the claim is one which cannot be successfully maintained, but until they came to that decision the plaintiff was still claiming a superannuation allowance; and, for all I know (the matter has not been argued before me), there might have been some grounds upon which the decision of the Secretary of State could have been impeached as being a decision which was not binding upon the plaintiff.

In these circumstances, at the date when the writ in this action was issued, Oct. 20, 1933, and at the date when the jury were empanelled, last Monday week, the plaintiff was not entitled under the Asylums Officers' Superannuation Act, 1909, s. 10, to receive back the deductions which the joint committee had made. I asked if the defendants would be willing to waive that point and that I should treat it as a valid claim in the action; but they are not willing that this should be done, and

therefore the plaintiff's claim which asks for an order for payment by the defendants to the plaintiff of the amount due in respect of the contributions made by him under the Act of 1909, cannot be made. At some time it was intimated by the defendants that it would be desirable to know what the view of the court was in regard to that matter. It seems to me now that the claim for superannuation allowance is finally determined and cannot be raised again in any proceedings. The decision in this action will be a *res judicata* as between the parties to it. The plaintiff is entitled to have back without interest the actual amount which the defendants deducted from his salary and sums which they were bound to deduct under the provisions of the Act.

It was further argued that this claim was barred by the Public Authorities Protection Act, 1893. I think it would be barred if in fact a claim could have been made for it after the decision of the Secretary of State in 1930; but it was open to the plaintiff to take the view that the decision of the Secretary of State, although it was said to be final under the Act, was not really final; that there was still a right of recourse to the court, and that the court was to have the final decision upon the matter. It seems to me that, so long as that position existed, there was no right to ask for the money and that therefore no question under the Public Authorities Protection Act arises.

That disposes of all the claims in this unfortunate, prolonged and costly litigation. The result is that the whole action stands dismissed with costs.

Solicitors: *William P. Webb* (for the plaintiff); *Robbins, Olivey & Lake*, agents for *F. V. Barber*, Winchester (for the defendant committee).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

RHOKANA CORPORATION, LTD. *v.* INLAND REVENUE COMMISSIONERS.[KING'S BENCH DIVISION (Lawrence, J.), **May 28, 1936.**]

Income Tax—Interest on debentures—Payable in foreign currency at fixed rate of exchange—Deduction of income tax—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21.

A company issued certain debentures secured by a trust deed, which provided, *inter alia*, that interest declared at sterling rates should be paid in sterling at the company's bankers in London, or at certain offices in New York in U.S.A. dollars at the fixed rate of exchange of 4.86 dollars to the £, or at certain offices in Amsterdam, in Dutch florins at the fixed rate of exchange of 12.11 Dutch florins to the £. The deed further provided that interest on registered debentures would be paid by cheque or warrant on the company's bankers sent through the post. The company duly paid the debenture interest on Dec. 31, 1931, deducting income tax at the rate of 5s. in the £ upon such interest in sterling. A certain warrant was cashed for dollars. The revenue authorities contended that in respect of that warrant a larger sum for income tax than that deducted by the company should have been deducted, such sum being arrived at by converting the total amount of the interest into dollars at 4.86 to the £, deducting tax in dollars at the rate of 5s. to the £ and reconverting this sum into sterling at the rate of 3.39 dollars to the £, the rate of exchange ruling on Dec. 31, 1931:—

HELD: interest was paid and tax had to be deducted when the warrant was posted, and inasmuch as at that time the company could not know when or where it would be presented for encashment nor the rates of exchange on the day on which it would be presented, the company must deduct income tax upon the interest in sterling. The right to get dollars or Dutch florins was an added right which did not affect the interest on the debentures which was payable as interest in sterling.

[EDITORIAL NOTE.] This case is confined purely to the payment of tax upon interest by deduction and deals only with the case, where after the issue of the interest warrant, the holder has the right to cash it in foreign currency. The decision is that such a right is purely an additional right of the payee and does not affect the amount of tax to be deducted from the interest in the case where the warrant is made out in sterling.

AS TO DEDUCTION OF TAX ON PAYMENT OF INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, pp. 229-231, paras. 464-468; and for CASES see DIGEST, Vol. 28, p. 82, Nos. 463-468.]

Cases referred to:

- (1) *S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544; 35 Digest 174, 39.
- (2) *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] 2 Ch. 589; 35 Digest 174, 46.
- (3) *Re British American Continental Bank, Ltd., Lisser & Rosenkranz's Claim*, [1923] 1 Ch. 276; 35 Digest 175, 54.

CASE STATED under the Income Tax Act, 1918, s. 149, and Finance Act, 1927, s. 26, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The facts and arguments are fully stated in the judgment.

A. M. Latter, K.C., and *A. Andrewes-Uthwatt* for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondents.

LAWRENCE, J. : The appellant company appeals against an additional assessment in respect of a sum of £41,578 6s. 11d., which is alleged by the revenue authorities to be " interest of money " within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 21. The company had issued certain 7 per cent. debentures secured by a trust deed which provided, *inter alia* :

FIRST SCHEDULE : (2) The company will until such payment pay to the registered holder hereof interest on the said principal sum as follows :—In respect of the period ending June 30, 1931, at the rate of 8s. 3d. per cent. In respect of the period ending Dec. 31, 1931, at the rate of £2 3s 9d. per cent. In respect of the period ending June 30, 1932, at the rate of £3 6s. 10d. per cent. And thereafter at the rate of 7 per cent. per annum by equal half-yearly payments on June 30 and Dec. 31 in each year. Such interest to be subject to United Kingdom income tax.

(11) The principal moneys premium (if any) and interest hereby secured shall be paid in sterling at Barclays Bank, Limited, 54 Lombard Street, London, or other the bankers of the company in London for the time being or at the registered office of the company or in U.S.A. dollars at the fixed rate of exchange at 4·86 dollars to the £ at the offices of Messrs. J. P. Morgan & Co., 23 Wall Street, New York, or in Dutch florins calculated at the fixed rate of exchange of 12·11 Dutch florins to the £ at the offices of Nederlandsche Handel Maatschappij N.V. Amsterdam. The interest on registered debentures will be paid by cheque or warrant on the company's bankers sent through the post to the registered address of the holder or in the case of joint holders to the registered address of that one who is first named on the register ; and every such cheque or warrant shall be payable to the order of the person to whom it is sent and payment of the cheque or warrant if purporting to be duly endorsed shall be a satisfaction of the interest.

(12) Upon the request in writing of the registered holder hereof the company will issue to him a debenture to bearer of the same denomination in the form set out in the second part of the first schedule to the said trust deed. Such debenture shall provide for payment of the principal moneys premium and interest hereby secured and then remaining unpaid at the times hereby fixed for payment thereof respectively. Upon or before such issue this debenture must be given up to the company to be cancelled and the person making such request must pay the expense of stamping the debenture to bearer and a fee of 2s. 6d. in respect of each debenture so exchanged.

Interest on these debentures was paid by warrant in the form of exhibit " C," and the case was tested in argument by reference to the figures in that warrant. Adopting these figures for the purposes of illustration, the commissioners have held that the sum which should have been deducted was not the sum of £14,165 17s. 8d., which was deducted by the appellants and paid to the revenue, but a sum arrived at by converting the sum of £55,616 1s. 11d. at 4·86 to the £, deducting tax in dollars at the same fraction as 5s. bears to the £ and reconverting the sum so arrived at in dollars into sterling at the rate of exchange, namely, 3·39, ruling on the day on which interest was due on the debentures, namely, Dec. 31, 1931, with the result that a much larger deduction has

to be made for income tax than the £14,165 17s. 8*d.*, because of the appreciation of the dollar on Dec. 31, 1931, from 4·86 to 3·39.

At the hearing before me the Attorney-General contended that the date at which the conversion from dollars to sterling should be calculated was the date of the actual payment of the warrant in dollars by Messrs. Morgan in New York and not the date, namely, Dec. 30, 1931, which had been adopted by the commissioners. For the appellants it was argued that the interest as such was payable in sterling, that the option as to what currency it should be paid in was vested by the trust deed in the appellant company and not in the debentureholders; that a contract to pay in foreign currency does not give rise to a debt, but is merely a contract to supply a commodity, that therefore the right to be paid in dollars or guilders was not a right to the interest provided for by the debenture, but a right to delivery of a commodity, namely, dollars or guilders; that the only payment of interest was the payment of sterling; that income tax could only be deducted in sterling; that rule 21 does not relate to foreign currency; that Finance Act, 1924, s. 33, is inapplicable to foreign currency; that the Income Tax Act of 1918, for example sched. C, r. 5, does not relate to foreign currency; that interest was paid by the warrant to the debentureholder on Dec. 31, 1931; and as he might and in fact did, in the present case, sell his warrant to someone who might cash it at a later date for dollars in New York, the sum which the debentureholder obtained could not truly represent the sum which the ultimate purchaser of the warrant might obtain in dollars at some subsequent date when the rate of exchange might have been altered; and that in any event the only sum paid in dollars on exhibit "C" was 201,000 dollars; and the conversion at 3·40 could only apply to that sum.

The Attorney-General on the other hand contended that the Income Tax Act generally, and rule 21 in particular, do contemplate payments in foreign currency; that there is no difficulty in applying a rate of tax at so many shillings in the £ to foreign currency; that conversion from foreign currency into sterling has frequently to be done under the Income Tax Act, for example, in computing profits and gains of a trade; that sect. 33 of the Act of 1924 is not inapplicable to foreign currency; that the debentureholder in the present case had the option of being paid in dollars or guilders, and where he exercised that option he received the dollars as interest and had to deduct a sum for income tax which had to be converted into sterling at the rate obtainable on that day; that the warrant if sold by the debentureholder was worth more than its face value in sterling; that the debentureholder would, therefore, get more for it; that there was no payment until the holder of the warrant exercised his option, and that adopting the figures of exhibit "C," where the debentureholder exercised his option to take payment in

dollars, the figures would be £55,616, which equals, at 4.86, 270,293 dollars, deduct 5s. in the £, or one-quarter, equals 67,500 dollars, convert at 3.40 equals £19,800, which is a quarter of £79,000, upon which figure tax should be calculated.

Like other cases which involve considerations of exchange, the case is one of difficulty, but I have come to the conclusion that the appellants are entitled to succeed on this appeal. Clause 2 of the trust deed provides for payment to the registered holder of interest at sterling rates on June 30 and Dec. 31, which by clause 11 is to be paid by cheque or warrant sent through the post. In my opinion, therefore, interest was paid and tax had to be deducted when the warrant was posted. The company, when it posted its warrants, could not tell when, where or by whom they would be presented for encashment; and could not tell what would be the rates of exchange ruling on those days. It follows, in my opinion, that the company could not deduct income tax in the manner contended for by the Crown. If the company had the option to pay in sterling, it could clearly have discharged its obligations by paying a net sum in sterling; if the debentureholder had or was conceded the option of taking dollars, the company could not compel him to exercise his option before his warrant was posted (see clause 11 of the trust deed). There is no provision for a deduction of income tax in suspense, rule 21 provides for deduction upon payment and at the rate in force at the time of payment; but the company could not deduct the income tax calculated in dollars until it knew whether the warrant would be cashed in dollars. Nor is there any provision for deduction of income tax in all three currencies. Moreover, rule 21 does not appear to me to refer to payment outside the United Kingdom; and the payment of dollars was only to be made in New York. The cases cited, *S.S. Celia v. S.S. Volturno* (1), and *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim* (2), *Re British American Continental Bank, Ltd., Lisser & Rosenkranz's Claim* (3), lay down that a contract to pay in foreign currency is a contract to provide a commodity; and I am of opinion that such a commodity is not interest of money within rule 21. The true view is, I think, that the right to get dollars or guilders is an added right, which does not affect the interest on these debentures, which is payable as interest in sterling, and rule 21 has no application to the added right. For these reasons, I am of opinion that the appeal must be allowed with costs, and the additional assessments discharged.

Solicitors: *Holmes, Son & Pott* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

KNOWLES *v.* SOUTHERN RAILWAY COMPANY.[COURT OF APPEAL (Slessor, Greene and Scott, L.JJ.), **March 26, 27, April 7, 1936.**]

Master and Servant—Workmen's compensation—Accident—"Arising out of and in the course of the employment"—"For the purposes of and in connection with his employer's trade or business"—Van driver leaving van to visit public house—Prohibition by employers against consuming intoxicating liquor while on duty—Accident while mounting van box—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1), (2).

The driver of a horse van while on duty left the box of his van and went to a neighbouring public house for the purpose of drinking a glass of beer. In doing so he was committing a breach of one of the rules issued by his employers, of which he had full knowledge, that "employees must not consume intoxicating liquor while on duty." The driver returned to the van and was in the act of mounting the box when he slipped, fell under a wheel and was fatally injured:—

HELD: the accident did not arise out of and in the course of the driver's employment within the Workmen's Compensation Act, 1925, s. 1 (1), nor was the act which caused the accident done for the purposes of and in connection with his employers' trade or business within sect. 1 (2) of that Act.

[EDITORIAL NOTE.] The point made in this case is that the act which the workman was engaged in doing at the time was not an integral part of his employment, but only an act reasonably incident to his employment, and done for his own purposes. It seems in such a case that, apart from absolute necessity, if such an act only reasonably incident to the employment is expressly prohibited by the terms of that employment, then the act cannot be in the course of the employment. It is not part of a man's employment to do an act, no part of his duty, which has been forbidden by a genuine and express prohibition.

AS TO EXPRESS PROHIBITION, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 173, 174, para. 363; and FOR CASES, see DIGEST, Vol. 34, pp. 297-309, Nos. 2471-2545.]

Cases referred to:

- (1) *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 34 Digest 288, 2415.
- (2) *Barnes v. Nunnery Colliery Co., Ltd.*, [1912] A.C. 44; 34 Digest 299, 2489.
- (3) *Moore (A. G.) & Co. v. Donnelly*, [1921] 1 A.C. 329; 34 Digest, 302, 2501.
- (4) *Everitt v. Eastaff & Co.* (1913), 6 B.W.C.C. 184; 34 Digest 296, 2459.
- (5) *Wilsons & Clyde Coal Co. v. M'Ferrin*, [1926] A.C. 377; 34 Digest 301, 2499.
- (6) *Warren v. Hedley's Colliery Co., Ltd.* (1913), 6 B.W.C.C. 136; 34 Digest 296, 2460.
- (7) *Davies v. Gwauncaeurgurwen Colliery*, [1924] 2 K.B. 651; 34 Digest 313, 2572.
- (8) *Brice v. Edward Lloyd, Ltd.*, [1909] 2 K.B. 804; 34 Digest 304, 2514.
- (9) *Borley v. Ockenden*, [1925] 2 K.B. 325; 34 Digest 314, 2573.
- (10) *Garrallan Coal Co. v. Anderson (or Devlin)*, [1927] A.C. 59; 34 Digest 304, 2511.
- (11) *Estler Brothers v. Phillips* (1922), 15 B.W.C.C. 291; 34 Digest 307, 2535.
- (12) *Taylor v. Lock* (1930), 23 B.W.C.C. 55, 444; Digest Supp.
- (13) *Martin v. Lovibond (J.) & Sons, Ltd.*, [1914] 2 K.B. 227; 34 Digest 322, 2635.
- (14) *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100; Digest Supp.
- (15) *Privett v. Darracq Motor Engineering Co., Ltd.* (1934), 27 B.W.C.C. 163; Digest Supp.

APPEAL from an award of His Honour JUDGE BENSLEY WELLS, made at Southwark County Court on Dec. 10, 1935, in favour of the widow of a deceased workman. The facts are fully set out in the judgments.

F. W. Beney for the appellants.

W. Shakespeare for the respondent.

SLESSER, L.J. : This is an appeal by the Southern Railway against an award in favour of Alice L. Knowles, widow, and one of the dependants of George Knowles, who died as a result of an accident on June 12, 1934. Knowles was employed by the Southern Railway as a van driver, and the material facts of the case, as found by the learned county court judge are as follows : On the day of the accident, the deceased started his work as a van driver, as usual, at 8.15 a.m. At 5.45 p.m. his normal working hours came to an end, but he was sent out again, shortly before 6 p.m., from the respondents' Tooley Street depot with a load which he should have taken to their depot at Nine Elms, arriving shortly after 7 p.m. While on his way from Tooley Street to Nine Elms, the deceased stopped his van outside a public house called "The Fountain" in the borough. He descended from the box seat, having first drawn into the near side kerb outside "The Fountain," put a chain on the near side hind wheel, removed the near side trace, and threw it over the back of the near side horse, and put the reins through a brass ring on the harness. He left the van boy, Arthur Gardiner, in charge. Knowles then crossed a street to a public house called "The Gladstone Arms," which is in a side turning almost opposite "The Fountain," where the van had stopped. At that public house, which Knowles reached at 6.15 p.m., he walked straight through to the lavatory, ordering a pint of beer as he passed through the bar. He came out of the lavatory, drank his beer quickly, and left the public house and went straight back to his van ; he was absent altogether between five and ten minutes.

Though there was no actual eye-witness of the accident, the county court judge came to the conclusion on the van boy's evidence that Knowles, having removed the chain from the wheel and replaced the trace and taken the reins in his hands, was in the act of mounting to the box seat when, probably owing to the fact that his horse started to move on at the moment, he slipped and fell under the wheel of the van, whereby he sustained injuries which caused his death. It was a pair-horse van of the usual pattern, the box seat being some considerable distance from the ground.

A number of the company's rules was tendered in the course of the case to support the appellants' argument that in leaving his van and visiting a public house in order to get a drink, the deceased had broken one of the company's rules, and the learned county court judge has found, of the several rules relied upon, the deceased was guilty of a breach of one of them, namely, a rule in a book issued in 1932, of which the deceased

had notice, to this effect : " Employees must not consume intoxicating liquor while on duty " (Rule 3 (5)). It is contended by the employers that, by reason of the breach of this rule, the respondent here cannot say that this accident arose in the course of the employment ; and the first question to be considered is whether, in leaving his van as he did, the deceased was or was not acting in breach of the prohibition contained in the rule referred to. As I read the learned county court judge's judgment and the evidence, the deceased left the van for two purposes ; the one, which the learned county court judge has assumed to be the dominant one, to drink a glass of beer, the other to use the lavatory. Had it not been for these two purposes, there is no reason to suppose that the deceased would have dismounted from the van when he did. On the finding of the learned county court judge, had there been no accident to defeat his intentions, all the acts done by the deceased from the time when he left the box seat on the van until he resumed his seat there would have been occasioned solely by and for the purposes of consuming the forbidden drink and using the lavatory, though at other times admittedly he might have left his box seat for many other reasons. Of the two motives which induced the deceased to leave his seat, the learned county court judge has found, as I have said, that his dominant purpose was the drinking of the beer. He could have performed his natural functions, presumably, at " The Fountain " or some public convenience, and I think it would be unreal to excuse his breach of rule merely on the ground that associated with the forbidden act was a legitimate purpose.

The learned judge has come to the conclusion that when he was mounting the box, the deceased had fully returned to his employment, and therefore finds for the dependant. This decision, for reasons which I state hereafter, I cannot accept, and find it necessary, therefore, to consider the case upon a different assumption. I start from the position that this man, at the time when he met with his death, in resuming his seat on the box, was about to complete, but had not completed, a course of activities all associated with the forbidden act of consuming liquor while on duty, and from the time of his descent from the van he must be taken to have been engaged on a prohibited adventure. The learned judge has come to a conclusion that, apart from the prohibition, the deceased was acting reasonably in going to the public house to drink the beer, so that that act, though not one which was a part of his employment, disregarding the rule, might yet have been regarded as so incidental to it that it could be taken to be within the sphere of his employment. But the learned judge also asked himself whether the prohibiting rule regulated the man's conduct in his employment or limited its scope. He was of opinion that the rule was merely regulative and; had the breach of the rule in this case occurred while the man was actually engaged in performing his duties, such a finding might well have given the workman

a right to compensation, apart altogether from the Workmen's Compensation Act, 1925, s. 1 (2), for the mere fact that an act causing injury is done contrary to a rule which does not limit the sphere of his employment, but only deals with conduct within that sphere, will not prevent the workman being able to say that the accident arose in the course of the employment: *Plumb v. Cobden Flour Mills Co.* (1); *Barnes v. Nunnery Colliery Co.* (2).

But in truth such a finding here, if not irrelevant, cannot be decisive of the present case; for though, had the workman been injured while drinking liquor when engaged in driving the van, the finding of the learned judge that the prohibition was merely controlling his work while he was doing his duty, might have been decisive in favour of the workman; on the issue, of course, of employment, the act here done, even without a prohibition, was not a part of the man's duty, but, at highest, an act reasonably incidental to his employment, and the prohibition of that particular act excludes it from being a thing contemplated by either party. It is no part of a man's employment to do an act which he has been forbidden to do by a genuine and express prohibition; it is not reasonably incidental to his employment: *Moore (A. G.) & Co. v. Donnelly* (3); "I cannot think that a man is within the protection of the Act when making an excursion for his own pleasure" (per COZENS-HARDY, M.R., in *Everitt v. Eastaff* (4), at page 187)—*a fortiori* in the case of a forbidden excursion. To exclude a permission otherwise to be inferred, it is enough that a man should be expressly prohibited from doing it to prevent the inferred permission arising; though where there is a direct duty to do an act operating the position may be otherwise, for there the duty to do the act has to be contrasted with the prohibition, which, on the facts, may be no more than a rule regulating the manner in which he has to do his duty. In a sense, the finding of the county court judge that Knowles would have been acting reasonably apart from the rule, suggests that the judge himself has found as a fact that the rule, at any rate, limited the position to this extent, that the incidental right to leave the van did not arise, if its purpose was in order that the driver might consume alcohol.

For these reasons, as I have said, the finding that the rule would be regulative, if the man were in his employment as when he was driving, cannot help the respondent in the present case. This is what I had in mind when, in the course of the argument, I suggested to Mr. Shakespeare that this rule might well operate to be regulative while the man was driving, and operate to exclude him from the sphere of his employment when he was doing an act, not his duty, but only reasonably incidental to the performance of it.

In these circumstances, it becomes necessary for the respondent to invoke sect. 1 (2) of the Act, in order to say that the prohibited act shall

be deemed to be done in the course of the employment, notwithstanding the prohibition. The learned county court judge has found, as I have pointed out already, that, apart from the prohibition, the journey to and from the "Gladstone" to the van was within the sphere of his employment, and therefore if the respondent can satisfy the requirements of that subsection and show that the act was done for the purposes of and in connection with the employers' business, she is entitled to succeed: *Wilsons and Clyde Coal Co., Ltd. v. M'Ferrin* (5). The learned county court judge has found that :

at the moment when he met with the accident Knowles was doing something for the purpose of his employers' trade or business, namely, mounting his van.

On this finding of the learned county court judge, the act here which caused the accident was the act of mounting the box seat. On this, the learned county court judge has found that at the time he met with his accident he had resumed his employment. He says :

He had duties to perform in relation to his horses and van beyond those which he performed when on the box seat. . . . I do not think it makes any difference that, in this particular instance, those two duties were rendered necessary by the fact that he had placed the chain on the wheel and removed the trace in order that the van might be left with greater safety while he was visiting the "Gladstone."

And he concludes on this matter :

I do not think there can be any doubt that, at the moment when he met with the accident, Knowles was doing something for the purpose of his employers' trade or business, namely, mounting his van.

With every respect to the learned county court judge, it is just here that my doubts begin. If the right conclusion be that on this occasion, whatever might be true on other occasions, he left his box seat for a prohibited purpose, the question whether in remounting the box, which was the last stage of the execution of his prohibited purpose, he was or was not doing something for the purpose of his employers' business is not an easy one. However, the matter is not free from authority. If a man, for his own purposes, deliberately goes away from the place where he was employed and meets with an accident on the way back before he reaches the point where he should do his duty, the judge is justified *prima facie* in finding that the accident did not arise out of his employment: *Warren v. Hedley's Colliery Co.* (6). In *Davies v. Gwaun-caegurwen Colliery* (7), a miner was in the habit of hanging his coat on a nail in a disused portion of a colliery which had been barred off; he was subsequently found fatally injured in a hole in the prohibited area. The county court judge held that the man was in a prohibited area for his own purposes only and that at the time of the accident he was not doing anything for the purpose of or in connection with his employers' trade or business. On this second finding, ATKIN, L.J., says, at p. 665 :

He was going out of the prohibited area and going back to a place to commence his work. It is idle to say, that while doing that and returning from a prohibited area, he was getting into the proper place of his employment for the purposes of his master's trade or business.

In *Brice v. E. Lloyd, Ltd.* (8), which was a case of a man who elected to take his lunch on a tank in the pump room, though a dining room was provided, and who, in getting off the tank to return to work, fell through an aperture and was scalded, there being no express prohibition, it was held that, in the language of FARWELL, L.J., at p. 809 :

the word "employment" in the Act is not to be confined to actual work. In my opinion it extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises and to take his meals on the premises. But he is not entitled, and therefore he is not employed to do things which are unreasonable or things which are expressly forbidden.

In *Borley v. Ockenden* (9), SARGANT, L.J., speaking of the words, "for the purpose of and in connection with the employer's trade or business," says, at p. 338 :

the workman must show that he was acting *bona fide* in the employer's interest. I think that in the present case the workman fails to show that . . . I think that the workman could only have taken advantage of sect. 7 if he could have shown that the act was done with the main object of furthering the employer's business.

In *Garrallan Coal Co., v. Anderson or Devlin* (10), a miner, who was killed in a shaft bottom, where it was held he had no right to be in breach of regulation, failed to prove that the act was for the purposes of his employers' business. These cases may be contrasted with that of *Wilsons and Clyde Coal Co., v. M'Ferrin* (5), where the workman had actually got back to the place where he was required to be to do his work.

Applying the principles contained in this class of case, I find it impossible to say that this man was doing anything for the purpose of his employers' business, until he had mounted the van to perform his duty to drive, and I think that until that time he was concerned only for his own purposes to get back into a position to perform his duty, an ability to do which he had himself interrupted for his own purposes. In the face of this difficulty, Mr. Shakespeare for the respondent endeavoured to say that the question was one of fact. I have already commented on the fact that the learned county court judge appears to have taken for granted that, once the man was mounting the van, he was doing something for the purpose of his employers' trade or business, though in truth, as I see it, he was but getting into the proper place of his employment for such purpose within the meaning of ATKIN, L.J.'s definition in *Davies' case* (7). In *Esler Bros. v. Phillips* (11), there was no question but that the county court judge had rightly directed himself, but here

a question of misdirection does arise. The problem which I have indicated, which has caused me much difficulty, was not, I think, considered by the learned county court judge. He does not seem to have considered that, apart from his own purposes, the man would never have left his box. In *Taylor v. Lock* (12), where a man was killed mounting a lorry after he had descended to obtain some tobacco, I do not think that the question here to be decided was considered at all. Indeed, all the indications are that the court acted on the assumption that the employment was uninterrupted, as indeed might well have been the case here, had there been no express prohibition.

For these reasons, I have come to a conclusion in favour of the appellants. I think that it is necessary for the respondent, having regard to the fact that the act done of leaving the van and returning to it was an act not within the deceased's duty or sphere of employment, to bring herself within sect. 1 (2) of the 1925 Act. In order to do this it must be shown that the act which caused the accident was done for the purpose of, as well as in connection with the employer's business. I think the evidence shows that that act, which was the mounting of the box, was done, though ordinarily incident to the deceased's employment, on this occasion not for the employers' purposes, but to enable the workman to resume his wrongfully interrupted employment, and to get back into the place where he could again perform his duty.

The respondent consequently cannot avail herself of sect. 1 (2), and therefore it is not possible to say that this accident arose in the course of the employment, for it is not part of a man's employment to do an act, no part of his duty, which has been forbidden by a genuine and express prohibition.

GREENE, L.J. : The workman in this case left the box of his van and went to a neighbouring public house for the purpose of drinking a glass of beer. In so doing he was committing a breach of his duty and that breach was one which would have continued until such time as he might take up his duty again. The relevant rule made by the company by which he was employed is as follows : " Employees must not consume intoxicating liquor while on duty," and the dominant purpose of the workman in leaving his seat on the box was to do something in breach of this rule.

Two main questions arise for decision. The first is whether the accident which happened to the workman, as he was climbing on to the box, arose out of and in the course of his employment within the meaning of sect. 1 (1) of the Act. In my judgment this question must be answered in the negative. The workman left his employment for purposes of his own. He ceased for the time being to do the work which he was employed to do, and he did so not for the purpose of doing some act reasonably incidental to his employment in respect of which the employer

must be taken to have given an implied permission, but for the purpose of doing something which was expressly forbidden. It may very well be the case that a man employed, as this workman was employed, is entitled where circumstances justify it, to leave the actual work which he is employed to do for the purpose of obtaining liquid refreshment. If that be the case it is because under his contract of employment permission to do so, as a matter reasonably incidental to his employment, is to be implied. Where an act which, but for a specific prohibition, might in appropriate circumstances be considered as reasonably incidental to the actual work which he is paid to do (as distinguished from an act which is in truth a part of that work) is expressly prohibited, it is in my judgment impossible to say that an accident which takes place in the course of doing that act arises in the course of his employment. In truth the contrary is the case.

It is convenient here to deal with a view of the learned county court judge, which, although only expressed by way of *dictum* and not as the basis of his decision, has a bearing on this question. He held that the prohibition in question is a rule regulating the conduct of a man in his employment and not a rule which limits the scope of his employment. He held that the question whether the rule falls into the one category or into the other is a question of fact. In so holding he was in my opinion wrong. The well-known division of rules into these two categories is merely a convenient aid for answering the question: Is the rule of such a character that an act committed in breach of it is an act done or not done in the course of the employment? When all relevant facts are found, this question is in my judgment without any possibility of controversy a question of law. Further, I think that the distinction between the two classes of rule has no real relevance to a rule which does not apply to the actual work which the workman is employed to do, but applies only to incidental matters arising during the period of employment—at any rate, where the breach of the rule does not take place at the time when the actual work is being performed, as might, for example, be the case with a rule against smoking. If, as in the present case, a man in order to break a rule which deals with incidental matters leaves the work which he is employed to do, he does in my opinion necessarily take himself out of the scope of his employment until, the incidental matter having been completed, he returns to the place where it was his duty to be. But this does not dispose of the matter. If a man leaves the place of his employment for the purpose of doing something which he was not employed to do in breach of a rule which forms part of his contract of employment and afterwards returns to his duty and resumes his work, an accident which takes place after that return and after that resumption is none the less an accident arising in the course of his employment because he had previously left his employ-

ment. It is a question of fact in each case whether or not at the time of the occurrence of the accident the man had returned to his place of employment and resumed his duty. In the present case the workman while returning from his excursion to the public house came back to his van, released the chain from the wheel, and replaced the near side trace; and the learned county court judge finds that after replacing the trace he took the reins in his hand and was in the act of mounting to his box seat when, probably owing to the fact that his horses started to move off at that moment, he slipped and fell under the wheel of the van. He also found—and this is the basis of his decision—that at the time of the accident the workman had resumed his employment and the reason which he gives for this finding is as follows:

He had duties to perform in relation to his horses and van beyond those which he performed when on the box seat. It was his duty to remove the chain and replace the trace. I do not think it makes any difference that, in this particular instance, those two duties were rendered necessary by the fact that he had placed the chain on the wheel and removed the trace in order that the van might be left with greater safety while he was visiting the "Gladstone." Even if his visit to the "Gladstone" was for his own purposes, it was his duty to put on the chain and remove the trace before leaving his van.

I am unable to agree that this reason can support the finding so as to make it an unassailable finding of fact. The necessity for removing the chain, replacing the trace and climbing back on to the box had arisen, and arisen only because the workman had left the place where it was his duty to be. If the question be asked: Why was the workman in the place where he was and performing the acts which he was performing when the accident happened? there can, in my opinion, be only one answer. It was because he had wrongfully left his work and was engaged in returning to it. It was not, in any relevant sense, because he was carrying out some duty which he owed to his employer that he removed the chain, replaced the trace, and started to climb on to the box. It was because of his own breach of that duty that he did these things. The reasoning of the learned county court judge is in conflict with that of LORD COZENS-HARDY when Master of the Rolls, in *Everitt v. Eastaff & Co.* (4). There a carter for purposes of his own returned to his employers' yard by a roundabout route, and stopped at a public house to drink. He then climbed back into the cart and while driving to the yard he was thrown out of the cart and killed. It was argued that the man's duty was to take care of his master's horse and cart and that however long he may have been getting back if he deviated from the ordinary route on an excursion of his own, so long as he took the horse and cart with him any accident which happened to him while driving the horse back to the yard would be an accident arising out of and in the course of the employment. It was argued that taking the

horse back to the yard was part of his duty, that the accident happened in the performance of that duty, and therefore the employers were liable. COZENS-HARDY, M.R., emphatically rejected that argument and his judgment was concurred in by BUCKLEY and HAMILTON, L.JJ., as they then were. A similar point arose in *Warren v. Hedley's Colliery Co., Ltd.* (6). In *Martin v. Lovibond & Sons, Ltd.* (13), no breach of duty was committed by a drayman who left his dray for the purpose of getting drink since there was no prohibition against his doing so, and on the facts of that case it was reasonably incidental to his employment to leave the dray at the time when he left it in order to obtain some reasonable refreshment. It was not the case of a man deserting his duty for the purpose of doing a forbidden act.

Davies v. Gwauncaeagurwen Colliery (7) was a case where a man went into a prohibited area for the purpose of hanging up his coat, and on his return therefrom fell into a hole in that area. ATKIN, L.J., says, speaking of this area, at p. 665 :

he had no business to go there ; it was completely railed off, and he could only go there by getting over or under the rail ; and what he was doing there he was doing for his own purposes. The fact that he had completed his own particular purpose of hanging up his coat and was returning to his screen is just as irrelevant as the fact that in *Brice v. Edward Lloyd, Ltd.* (8), the man had finished eating his meal and was getting off the tank. He was going out of the prohibited area and going back to a place to commence his work. It is idle to say, that while doing that and returning from a prohibited area, he was getting into the proper place of his employment for the purposes of his master's trade or business.

It appears to me to make no difference that the man in this case left his place of employment for the purpose of doing something which was in breach of a rule against drinking intoxicating liquor. An area to which a man goes for the purpose of breaking such a rule is in my judgment just as much a prohibited area as was the area in *Davies'* case (7).

Reliance was, however, placed on the decision of this court in *Taylor v. Lock* (12). In that case the driver of a steam lorry left the lorry for the purpose of obtaining some tobacco from his father who was working in a field adjoining the road, and also, apparently, of relieving himself. On his return to the road he signed to the steersman to drive the lorry towards him, and in attempting to board the lorry while in motion he fell and was killed. The learned county court judge in that case found, as I read the extract from his award, that the man had left the lorry for purposes of his own, and therefore left his employment, and that consequently the accident which took place before he returned to the place of his employment did not arise in the course of his employment. It was held by this court that the real question to which the learned county court judge should have directed his mind was whether or not the man's negligence in attempting to mount a moving lorry was so marked as to take his action in doing so out of his employment. It is said

that this decision must be treated as a decision to the effect that the man who had left his employment for purposes of his own must be taken to have come back within his employment the moment that he set himself to regain the driving seat of his lorry. I cannot so read the decision. No reference to any such point is to be found in the judgment either of SCRUTTON, L.J., or of SLESSER, L.J., and I cannot believe that if they had intended to decide any such point they would have passed it over in silence. It is to be observed, moreover, that none of the authorities to which I have referred, except that of *Warren v. Hedley's Colliery Co.* (6) were cited. As I read these judgments, they are much more consistent with the view that the court thought that in leaving his lorry in the circumstances he was not deserting his work, but was merely doing something as reasonably incidental to it as if he had stopped to buy tobacco at a tobacconist's. On that hypothesis, no question as to his having returned to his duty would have arisen since he never would have left it. When the case came back to this court it was heard by LORD HANWORTH, M.R., and LAWRENCE and SLESSER, L.JJ. SLESSER, L.J., who was the only member of the court who was present on both occasions, states his recollection of what had taken place at the first hearing as follows (at p. 458) :

The question was, first, had there been an interruption of the employment ; and second, had the workman hazarded some risk that took him out of the employment. The Court of Appeal came to a conclusion on the first point in favour of the workman. It was, of course, on the second point that the matter was sent back to the learned county court judge.

But although I think that this case cannot be treated as a decision on the point with which I am now dealing, it does nevertheless contain a *dictum* by ROMER, L.J., who was a member of the court at the first hearing, which supports the respondent's argument. He says at p. 63 :

I will assume that when he got down from the engine and entered the field where his father was working he did it solely for the purpose of getting some tobacco from his father, and that in so doing he temporarily left his employment. Assuming that, having temporarily left his employment, it was his duty to his employer to re-enter the employment as soon as possible, and, in my opinion, when he was—on the assumption that I have made—getting up on the step to get into the steam engine again he had re-entered his employers' employment.

This observation of the learned Lord Justice does not, as I read it, mean that any accident which happened to the man while returning to his employment would have been an accident arising in the course of an employment. It means that on the facts of that case the man had, at the moment when the accident happened, actually re-entered the employment, and if that were so, the accident must have happened in the course of it. ROMER, L.J., proceeded to quote a passage from the judgment of LORD COZENS-HARDY in *Warren v. Hedley's Colliery Co.* (6), at p. 138, to the effect that ;

if the workman goes where it was not his duty to go and practically gets back and resumes his work before the accident happens, the fact that he went away does not in any way disentitle him to the protection of the Act.

It is, I think, on the word "practically" in this passage that the *dictum* of ROMER, L.J., is based, but the use of that word by LORD COZENS-HARDY is, I think, intended to cover the case where a man has substantially reached the point where according to his duty he ought to be, and where he would have been if he had not deserted it. In the same judgment LORD COZENS-HARDY uses a phrase which to my mind shows that by the word "practically" he was not contemplating a case where some substantial movement was required before the man could be said to be back at his post of duty. He says, at p. 140 :

I think if a man for his own purposes deliberately goes away from the place where he was employed, and meets with an accident on the way back before he reaches the point where he should be to do his duty, the judge is justified in finding, *prima facie*, that the accident did not arise in the course of his employment.

It is in my respectful opinion important not to approach the question as to whether the man has reached the point where he should be to do his duty from the point of view merely of the number of feet or yards which lie between the place where the accident happened and the place where he ought to be. It is the nature of the intervening space as well as its dimensions which must be considered. If that space, for example, is a danger zone, as it might well be in a mine or a quarry, the fact that it is comparatively small and quite close to the point where the man ought to be would not in my judgment make it proper to say that, while he was in the act of crossing it, he had reached or practically reached the point where he ought to be. So in the present case the distance which lay between the point where the accident happened and that where the man ought to have been was comparatively short, but, as events proved, and as anyone who knows the habit of horses can believe, it was one in which there was risk of accident. The man had no right to be at the spot where the accident took place. It was a dangerous spot, and the fact that it was physically quite near to the place where he ought to have been appears to me to be quite insufficient on principle to satisfy what I conceive to be the true test. In any event, the observations of ROMER, L.J., amount to no more than a finding upon the facts of the particular case before him.

The other point arises under sect. 1 (2), and can be dealt with quite shortly. In order to obtain the benefit of that section the workman must show that the act was done "for the purposes of and in connection with his employer's trade or business." It seems to me that the act done by the workman in this case was quite clearly done for his own purposes and not for those of his employers' trade or business. It was

to please himself that he chose to go to a public house to drink beer. I cannot see how it can be for the employers' purpose to do a thing of this nature when the employers have expressly prohibited it. Here, also, it is important to observe that the act was not an act which he was employed to perform. If a man is employed to work an engine for his employer and in breach of a regulation works it in a prohibited way, he is nevertheless working it for his employer's purposes. But where the act is not an act which the man is employed to perform, but is merely an incidental act such as taking refreshment, the position appears to me to be very different, and if he chooses, having two ways of doing such an incidental act, to select the prohibited one in order to please himself, he is acting for his own purposes and not for those of his employer. I say two ways because a driver who is suffering from thirst, if it is necessary for him to obtain liquid refreshment, can select for the purpose intoxicating or non-intoxicating drinks. If the former is forbidden to him and he nevertheless chooses it, his act in going to get it is an act done for his own purposes to satisfy his own tastes.

The subsection uses the words "if such act was done." The word "act" refers back to the word "acting" in the phrase "notwithstanding that the workman was at the time when the accident happened acting in contravention" of a regulation or order. In my opinion in the present case the act which was being done by the workman at the time when the accident happened cannot be treated as though it was merely the act of climbing on to the box. The nature, quality and purpose of that act must I think be determined by reference to the entire action of the workman of which it formed part, namely, leaving his employment for purposes of his own and returning to it in order to regain the place which he never ought to have left.

Reliance was placed by the respondent on the decision of the House of Lords in *Thomas v. Ocean Coal Co., Ltd.* (14); but in that case there was no question of the man deserting his employment for purposes of his own. As LORD BUCKMASTER said, at p. 110:

It arose out of his employment certainly, and was, in my opinion, in the course of it, seeing that, apart from the prohibition, the action, although hazardous, was due to the man's desire to expedite the process he was engaged to control.

The case was not one like the present where the man had taken himself right outside the scope of his employment by abandoning his duty and going off on an excursion for his own purposes.

I agree that the appeal should be allowed.

SCOTT, L.J.: The details of the facts have been sufficiently stated in the judgments already delivered. The crucial facts are few; they are these: (1) The appellant company had a rule which said "Employees must not"—these words were printed in large capitals—" (v) consume

intoxicating liquor while on duty." The rule was in a book of rules, a copy of which the learned judge finds as a fact had been given to the deceased man, a carter, whose duty it was to drive a horse van. There is no doubt that the rule was well known to the employees of the company. (2) On the evening when the accident occurred he left his horses and van, and went away some distance up a side street to a public house for the purpose of getting a glass of beer. Whilst there he passed water, but the judge found as a fact that his dominant purpose in going to the public house was to get the beer—as he was in the habit of doing. (3) When he got back he put the van and horses back into a starting position, and was himself "in the act of mounting to his box-seat," but for some reason—probably because the horses started before he was ready, as found by the learned judge—he slipped, fell and was fatally injured. The facts—all found by the learned judge—are sufficient to dispose of the case, and in my view it is unnecessary to consider any others.

The first question of law arises under sect. 1 (1) of the Act, and is whether the legal effect of the prohibition of intoxicants was to put a servant's departure from the post of duty in quest of forbidden drink outside the sphere of his employment, or merely "to regulate his conduct within it," the test which was propounded and analysed by LORD DUNEDIN in *Plumb v. Cobden Flour Mills Co.* (1), although he there took care to point out that the test is not always exhaustive. The learned judge answered this question by holding that the rule did not limit the employment, but only regulated the workmen's conduct within the sphere of their employment, from which it would follow necessarily that the applicants would be entitled to an award. But this was, in my view, an erroneous conclusion. I have no doubt whatever that so important a rule, applicable, as was proved in evidence, to the company's horse drivers and motor drivers alike, is one which was intended to exclude altogether from the sphere of employment any act in disobedience to the prohibition. Whether it would have that effect if the disobedient workman were in fact at the same moment performing his contractual duties, it is not necessary in this case to decide. It certainly has that effect where a man leaves his work in order to get such drink. In the present case, that inference applies *a fortiori* on a further ground. When the learned judge held that "apart from the rule Knowles was acting reasonably in going to the 'Gladstone' for a glass of beer," he meant to express a conclusion that such an act should be regarded as within the employment, because it was reasonably incidental to it. But if it was thus within the employment, it must have been only as a liberty conceded to the workman and not as a contractual duty imposed upon him; and the effect of a direct and absolute prohibition of intoxicants "on duty," must have been to negative any such implied concession. If a driver is not to leave his post of duty in pursuit of such drink, it

cannot be in the course of his employment for him to be absent on such an errand.

In view of the above finding, the judge's decision in favour of the respondent seems to have been given under sect. 1(1) of the Act. If so, it was not necessary for him to consider subsect. (2); but he did in fact add a finding that "at the moment when he met with the accident, Knowles was doing something for the purpose of his employer's trade or business," and cited the case of *Privett v. Darracq Motor Engineering Co., Ltd.* (15) in this court. I cannot see the relevance of that case in that context; but it is necessary to consider this finding in favour of the respondent, because it is expressed in the very words of the proviso at the end of subsect. (2). I think it rests upon a fallacy, and is wrong in law. The continuity of the service once interrupted, as it was as soon as the deceased started to descend from his box seat upon his forbidden errand, it was not possible for it to be resumed until the deceased had completed his excursion and got back to his starting point. Another way of arriving at the same conclusion is to note that if he had continued to do his duty and had never started upon his excursion, he would not have got down where and when he did, and would not have been engaged in the fatal act of climbing up again at the time when, and place where, he did attempt to climb up. Consequently he was not "doing anything for the purpose of his employer's trade or business" at any time subsequent to the moment of his starting to leave the box on his excursion; and from that moment till and including his fall he was acting for his own private purposes and not for his employer's. Subsect. (2) does not, therefore, help the respondent.

I have perused the judgments of SLESSER and GREENE, L.JJ., and agree with both, including their analysis of the relevant cases; but this case appeared to me to be so plain that I did not think it necessary to discuss the cases. I agree that the appeal should be allowed.

SLESSER, L.J.: The appeal will be allowed with costs, in this court and in the county court on scale C.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *William Bishop* (for the appellants, the employers); *Pattinson & Brewer* (for the respondent, the widow).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

ASHBY, WARNER & CO., LTD. v. SIMMONS.

[COURT OF APPEAL (Greer, Greene and Scott, L.JJ.), June 9, 10, 11, 1936.]

Companies—Charges requiring registration—Charge on book debts—Authority to debtor to pay creditor a named sum out of next payment due—Companies Act, 1929 (c. 23), s. 79 (6).

A firm A. contracted with the London County Council to install steam plant in a hospital. It subcontracted with another firm B. to do some of the work. A. fell into financial difficulty and gave B. an authority addressed to the L.C.C. to pay B. a named sum against the chief engineer's next certificate. The L.C.C. took interpleader proceedings against B. and the receiver of A. (appointed by the debenture holder after the authority was given), and the Divisional Court ordered the sum to be paid to B. The receiver appealed on the ground: (i) that the authority was a charge on the book debts of a company and, not having been registered under the Companies Act, 1929, s. 79, was invalid; (ii) that he ought to have credit for the expense he incurred in completing the work that was to have been done by B. :—

HELD: (i) the authority was an absolute equitable assignment and not a charge within the meaning of the Companies Act, 1929, s. 79.

(ii) the receiver could not by any subsequent conduct alter the nature of the authority or the subcontractor's rights under it, and his remedy in respect of the expense incurred if any was by action for breach of contract.

[EDITORIAL NOTE.] The point made here is that for registration to be necessary under Companies Act, 1929, s. 79, there must be a charge. In the present case there was an absolute assignment and not a charge, there being no provision of any kind for redemption, which is the characteristic of a charge.

AS TO CHARGES REQUIRING REGISTRATION, see HALSBURY, Hailsham Edn., Vol. 5, pp. 504-506, para. 814; and FOR CASES, see DIGEST, Vol. 10, pp. 789, Nos. 4942-4946. FOR THE COMPANIES ACT, 1929, s. 79, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 2, pp. 822-825.]

Cases referred to:

- (1) *Saunderson & Co. v. Clark* (1913), 29 T.L.R. 579; 10 Digest 789, 4945.
- (2) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; 5 Digest 697, 6128.
- (3) *Ladenburg & Co. v. Goodwin, Ferreira & Co., Ltd. & Garnett*, [1912] 3 K.B. 275; 10 Digest 789, 4943.
- (4) *Re George Inglefield, Ltd.*, [1933] Ch. 1; Digest Supp.
- (5) *Smith v. Everett* (1792), 4 Bro. C.C. 64; Digest Supp.
- (6) *Tancred v. Delagoa Bay & East Africa Ry. Co.* (1889), 23 Q.B.D. 239; 8 Digest 443, 195.
- (7) *Gorringe v. Irvell India Rubber & Gutta Percha Works* (1886), 34 Ch. D. 128; 10 Digest 934, 6406.
- (8) *Saunderson v. Perrin* (1870), 22 L.T. 419; 8 Digest 446, 218.
- (9) *Tooth v. Hallett* (1869), 4 Ch. App. 242; 5 Digest 695, 6122.
- (10) *Allen v. Royal Bank of Canada* (1925), 95 L.J.P.C. 17; Digest Supp.

APPEAL from a judgment of the Divisional Court (TALBOT and LAWRENCE, JJ.), delivered on Jan. 17, 1936, in favour of the respondent company, awarding them the sum of £338 9s. 11d., and costs.

The appellant was a receiver and manager appointed by the sole debenture holder of a company known as the National Heating Co.

(1928), Ltd. This company contracted with the London County Council to install steam plant in Lambeth Hospital, and subcontracted with certain other firms, one of whom was Ashby; Warner & Co., Ltd., the respondents, to do some of the work. The respondents were to be paid partly in cash and partly by bills of exchange. At the beginning of July, 1933, the National Company was in financial difficulties and dishonoured one of these bills. Accordingly on July 14, of that year the National Company sent the respondents an authority, or authorisation, addressed to the L.C.C. in the terms set out in the judgment of GREER, L.J. The respondents passed this document to the L.C.C. On July 28 the sole debenture holder appointed the appellant receiver and manager of the company. On Aug. 3 the respondents wrote to the appellant asking him to confirm the authority given by the National Company and to give a security for the balance of the contract and informing him that in the meantime the contract had been stopped pending a settlement. The appellant replied that he could not confirm the authority or give security for the balance of the contract and that he had written to the L.C.C. cancelling the authority. On Aug. 30 the solicitors of the L.C.C. wrote to the respondents saying that the next certificate had been for the sum of £27.

In Jan., 1935, the L.C.C. instituted interpleader proceedings and brought into court £836 1s. 5*d.*, the value of the final certificate issued by the chief engineer. The interpleader issue, settled in May of that year, stated that the respondents agreed to do certain work for £736 19s. 11*d.*; that the National Company paid £200 on account; that the National Company gave the L.C.C. an authority and direction to pay the respondents £338 9s. 11*d.* out of the next certificate; that the said authority was not registered as a charge under the Companies Act, 1929, s. 79; and that the chief engineer of the L.C.C. issued a certificate for £836 1s. 5*d.* and the L.C.C. had brought the sum of £338 9s. 11*d.*, part thereof, into court. In July, 1935, Master Ball gave judgment for the present appellant and ordered this sum to be paid out to him.

The respondents appealed to the Divisional Court, which, on Jan. 17, 1936, set aside the master's order and gave judgment for the present respondents for the sum of £338 9s. 11*d.* The court concluded that the authorisation was not given as collateral security for the debt and was therefore not a charge on a book debt within the meaning of the Companies Act, 1929, s. 79. LAWRENCE, J., giving the judgment of the court, said that the intention of the parties was that the present respondents should receive payment direct from the L.C.C. and not from the National Company. The authorisation was in form an absolute assignment, and was a charge only in the sense that the sum was payable out of the moneys to be certified by the L.C.C.'s chief engineer, and in the same sense that salaries were said to be charged

upon certain funds ; in this sense every assignment of a *chose in action* was a charge. It was secured only in the sense that the payment was made safe by the fact that the L.C.C. and not the National Company became bound to pay it. It was not intended to create a collateral security for the payment by the National Company, nor that they should have the option of redeeming the supposed security by payment, i.e., there was no equity of redemption. The authorisation was analogous to a post-dated cheque. The reference to "the next certificate" meant the next certificate which was sufficient to satisfy the sum specified. The court held, however, that if the transaction constituted a charge, the charge was on book debts. Finally, the receiver's repudiation of liability under the authorisation justified the present respondents in refusing to perform their subcontract.

The receiver appealed.

Ralph Sutton, K.C., and *H. G. Garland* for the appellant receiver.

C. L. Fawell for the respondent company.

Sutton, K.C. : The Divisional Court made the false assumption that an equitable assignment of part of a fund need not be a charge upon that fund. The whole essence of an equitable assignment is that it creates a charge upon the fund which it affects. The money was still due after this authorisation was given, therefore it was a collateral security. There is no evidence that the National Company was released from liability. As no property was transferred, it was irrelevant for the Divisional Court to say that there was no equity of redemption. The section says that a charge includes a mortgage, but not that a charge means a mortgage ; therefore there can be charges which are not mortgages. Even if the National Company had been released, this transaction should still have been registered.

By *Smith v. Everett* (5), an order to pay money out of a particular fund gives the party a specific lien thereon ; and constitutes a charge : *Tancred v. Delagoa Bay and East Africa Ry. Co.* (6). There is no distinction between an assignment and a charge, and as between assignor and assignee no notice need be given to the legal debtor : *Gorringe v. Irwell India Rubber and Gutta Percha Works* (7). Even an hypothecation of the proceeds of goods shipped is a charge on book debts : *Ladenburg & Co. v. Goodwin, Ferreira & Co., Ltd. Garnett* (3). In *Saunderson v. Perrin* (8) a similar authorisation was held to be an equitable assignment and hence a charge. The equitable assignment in *Saunderson & Co. v. Clark* (1) was precisely similar to the present transaction, and was held by LUSH, J., to be a charge. The legislature is accustomed to use the word "charge" for an equitable assignment, e.g., the Common Law Procedure Act, 1860, s. 29.

Counsel, at the request of GREENE, L.J., read a portion of the judgment of ROMER, L.J. in *Re George Inglefield, Ltd.* (4), for a distinction between

a transaction of sale and a transaction of mortgage or charge. There (he said) the goods were capable of being sold, the transaction appeared to be an out-and-out sale, and the creditors were trying to maintain that the transaction was by way of a "charge or mortgage." It was held to be a transaction of sale and purchase.

If this present authorisation had been registered, it would have made the respondents secured creditors.

The respondents should have given credit to the receiver for the work he afterwards carried out: *Tooth v. Hallett* (9). The authority was an assignment only of the money due to them under the subcontract.

Garland, following for the appellant: If a bill or note is given by a debtor to his creditor on account, and accepted, and nothing is said as to the terms on which it is given, the legal effect of the transaction is that the original debt remains, but that the remedy is suspended until the maturity of the instrument in the hands of the creditor: *Allen v. Royal Bank of Canada* (10). When a business man takes a document and treats it as a post-dated cheque, unless there is some express bargain he cannot be heard to say that he is taking it merely as satisfaction. It must be regarded as a security given for the payment of a debt: *Tailby v. Official Receiver* (2).

Equitable assignments act on the conscience of the assignor, and it is unconscionable for the equitable assignee of an insolvent company to come before the court and claim £338 for £51 worth of work.

Fawell, for the respondents, was not called upon.

GREER, L.J.: In this case we have listened for over a day to a long, forcible and well-stated argument in favour of a proposition that is really not arguable at all. The question which the learned judges in the court below decided, at any rate as regards one point, turns on the meaning and the effect of the Companies Act, 1929, s. 79, which enacts that if a charge is created, it shall be void if it is not registered in accordance with the provisions of that section. The section clearly applies to a charge on book debts, and there is not, and cannot be, any dispute that, if the transaction in question was a charge on something that was a book debt, it should have been registered. There is no doubt about that, and we have not heard any argument from the respondents on that question. Be that as it may, it fell to be determined as a first question whether the transaction was a charge or something different. In a case to which our attention was called—*Saunderson & Co. v. Clark* (1)—where a matter of this sort came for decision before LUSH, J., the learned judge pointed out what had also been pointed out in *Tailby v. Official Receiver* (2): that the matter must be regarded as one of substance and not merely one of the form of the document.

Before dealing with that question, I ought to state how it arose between

these parties. The London County Council are the proprietors of a hospital, and they desired to have heating apparatus installed. They made a contract with the National Heating Company to supply the whole of the apparatus that was necessary for the heating of the hospital. As is common in cases of this kind, the contractor did not do the whole of the work himself; he employed subcontractors. One of the subcontractors whom he employed for a certain portion of the work was the company known as Ashby, Warner & Co., Ltd. The L.C.C. having met with rival claims, one claim being by the receiver appointed by the debenture holder in this company, and the other being by the subcontractor, Messrs. Ashby, Warner, Ltd., an interpleader issue was ordered, and the question on the interpleader issue is stated in these terms :

Whereas the plaintiffs affirm and the defendant denies that the plaintiffs are entitled as against the defendant to the sum of £338 9s. 11d. part of the said sum of £836 1s. 5d., and the plaintiffs also affirm and the defendant denies that the said authority is a valid equitable assignment, and the defendant affirms and the plaintiffs deny that the said authority is a charge on book debts and is void against the defendant as receiver aforesaid pursuant to sect. 79 of the Companies Act, 1929, and it has been ordered by the order of Master Ball dated the 21st day of January, 1935, that the said questions should be tried in Middlesex by a judge alone, therefore let the same be tried accordingly.

By arrangement between the parties the issue was tried, not by a judge, but by the master himself, Master Ball; and Master Ball decided against the receiver, treating this document as a security. There was an appeal from that decision to the Divisional Court, which reversed the master, holding that the transaction in question was not a transaction whereby a charge was given, but was an equitable assignment of a debt. The question for decision is whether we ought to reverse the finding of the learned judges in the Divisional Court.

The matter falls to be determined partly on the correspondence and partly on the evidence which was given by a Mr. Blakeborough with reference to the correspondence. Three separate subcontracts were entered into by Messrs. Ashby, Warner with the head contractor. On the second contract moneys were due within a certain period after delivery of materials upon the site. Moneys having become due upon bills, the bills were not met. Before these transactions had arisen the debenture holder had insisted upon her right to enforce her debenture, and Mr. Simmons, the respondent, had been made receiver for the debenture holder. Thereupon the money due under the second contract, increased by the amount of £40, due under the third contract, not having been paid in accordance with what had been arranged between the parties, this correspondence took place. The appellants wrote to the National Heating Company—this was before the appointment of the receiver—in the following terms ;

As per your request to our representative Mr. John E. Blakeborough, we beg to formally advise you that your acceptance for £200 has been lodged with our bankers, Messrs. The Midland Bank, Ltd., 5, Princes Street, E.C.2, and will be falling due at the end of this month—

giving them notice, of course, that the appellant company would require payment of the bill at the end of the month. The answer is in these terms, written on June 27 :

We thank you for your letter of the 26th instant. When Mr. Blakeborough last called on us he informed us about your difficulty in discounting our bills and we discussed with him quite frankly the position we found ourselves in as regards your account. We explained to him that we relied on a settlement from the London County Council with which to meet your bills. The subscriber has just returned from an interview with the chief engineer, who states that, although the covering has progressed satisfactorily, no part of it has been completed yet and consequently we cannot have a draw thereon. We explained the position to him as regards your bills, and he stated that a special measurement could be made of the covering installed with a view to making you a payment direct. You will thus appreciate that we would prefer you to retire the bill from your bankers pending an arrangement with the L.C.C. You can confirm the above if you will ring up Mr. Ray, Chief Engineer's Dept., Public Institutions, London County Council. If your Mr. Blakeborough will call on us, we shall be only too pleased to arrange the matter to your entire satisfaction.

Messrs. Ashby, Warner replied in a letter dated June 29. On July 8 they wrote again as follows :

We beg to refer to our telephonic conversation of this morning with your Mr. Kirk, and, as arranged, our Mr. Blakeborough will be calling on Monday morning next at 11 a.m. to pick up cheque for £100 as promised, and we shall also be glad if you will arrange at the same time to give him a letter of assignment addressed to the solicitor of the L.C.C. for the sum of £536 19s. 11d.

So that what they are asking for is not security for the payment of the money due to them, but an assignment addressed to the solicitor of the L.C.C. for the sum of £536 19s. 11d. On July 14 the National Heating Company wrote enclosing an authorisation for £338 9s. 11d., and expressing their willingness to give an assignment in respect of £338 9s. 11d., the amount due on the second contract as modified by the third. They go on :

This charge clears our account in connection with Lambeth Hospital with the exception of your invoice for £198 10s., which my directors have asked me to hold over for a few days for the following reasons. There has been nothing drawn from the L.C.C. during July for account of Lambeth Hospital, and there is more likelihood of your being paid the sum of £338 9s. 11d. *in toto* during July than if we made the charge for the total of your account.

Furthermore there is a strong possibility of fresh capital being put into our business in the course of the next few days and once this is effected it would alter our proposals as regards the final settlement of the balance of £198 10s.,

I read that as meaning "We are about to have payment by means of an order on the L.C.C. of the sum of £338 9s. 11*d.*, leaving to be settled in future what is to be done with regard to £198 10s. for the first contract."

Next comes the document which is alleged to be a charge within the meaning of the Companies Act, 1929, s. 79. It is addressed to the solicitors' department of the L.C.C. and is in these terms :

We, THE NATIONAL HEATING COMPANY (1928) LIMITED, of 41, Westminster Bridge Road, London, S.E.1, HEREBY AUTHORISE AND DIRECT you to pay to ASHBY, WARNER & CO., LTD., of Lee Conservancy Road, Homerton, London, E.9 (whose receipt shall be a good and sufficient discharge), the sum of THREE HUNDRED AND THIRTY EIGHT POUNDS NINE SHILLINGS AND ELEVEN PENCE (£338 9s. 11*d.*) out of the next certificate to be issued by the chief engineer under the contract, it being understood that such payment is not to prejudice or affect in any way our obligations and liabilities under or in respect of the said contract.

Dated this 14th day of July, 1933.

for THE NATIONAL HEATING COMPANY (1928), Ltd.

Director.

Secretary.

Then, when we look at the evidence which Mr. Blakeborough gave concerning the interview which was referred to in the correspondence, we find that he said in chief :

On July 14 I enquired as to what he wanted to do to bills presented and dishonoured—telling him that obviously I could not accept any further bills ; it must be a cheque of equal value. He asked me if I would take an assignment authorising the L.C.C. to pay us direct. I agreed on condition that the assignment was for the full amount outstanding. I came away under that impression and certain letters passed.

The assignment turned out not to be for the full amount outstanding, but only for what was outstanding under the second and third contracts. Then he says :

Nothing was said about security. It was not a question of security.

It is quite true that one has to take his evidence in chief with his cross-examination, in which he said :

When I took the assignment I was *not* taking it in full payment ; it spreads over the whole.

I understand that to mean that he was not taking it in full payment of all the moneys that would become due ; he was taking it in full payment of that which was admittedly due under the second contract.

I did not finish the contract, therefore I was told to stop it. We treated it as payment *in advance*. There is no entry of it in our books, for the reason that we treated this as a post-dated cheque.

Now a post-dated cheque, until the time has come when it has to be met,

is payment. It is not a security, either within the meaning of sect. 79 or at all. It is in fact payment for the time being, and the debt is gone when that cheque is drawn, unless, the cheque not having been met, the rule of common law prevails that the debt revives on the failure to meet the cheque.

Those being the facts, we have to consider first of all what is the position at common law and what is the difference between that and the position in equity. At common law there is a plain distinction between the idea of a security and the idea of an assignment. The common law, however, failed to recognise that rights could be created by an order for payment of a sum out of a larger sum. That was not regarded at common law either as a security or as an assignment. Equity, however, which now prevails in all courts, did justice to the party who received an assignment of part of a larger sum, by holding that that assignment gave him an equitable claim on the fund if the fund came into existence. In my judgment, following the principles stated by LUSH, J., the Divisional Court was clearly right in holding that this was not a case of the giving of a security at all, but was a case of the giving and the acceptance of an assignment of money which was undoubtedly expected to become due from the L.C.C. at a future date. The next certificate was only a certificate for £27, but no point is now made on that fact, and we are to treat the final certificate, given for a sum of over £800, as the "next certificate" within the meaning of the contract.

A number of observations by judges of high authority were cited by Mr. Sutton in his vigorous and persistent argument—which has the great value that Mr. Sutton has, if he will allow me to say so, hereditary skill in these matters—to the effect that there is no distinction in law between a contract to assign part of a larger debt, and a security. Undoubtedly there are passages in some of the judgments of judges of high authority in which, as a matter of expression, they use the words as if an assignment of part of a debt, and a security, were identical terms. I asked Mr. Sutton if he could draw our attention to any cases where the rights of the parties depended upon a decision whether the transaction in question was a security or an assignment, and he was unable to draw our attention to any such case. I do not think it has ever happened except in the case of *Ladenburg v. Goodwin, Ferreira Company Limited* (3), in which a decision was given by PICKFORD, J. (as LORD STERNDALÉ then was). There it is quite clear that the learned judge was dealing with a document which hypothecated the goods and the proceeds thereof. Inasmuch as it was expressly an hypothecation of goods, it was clearly a charge and not an assignment, and on those grounds the decision rests. But there is no reference in this present document to anything of that kind. It is a document which in equity is regarded as a good assignment, though it would not be a good assign-

ment in law. The effect of such an assignment appears to be—I speak humbly on these questions of equity, as Mr. Sutton did—that it gives to the assignee a right to make a claim upon the fund in equity when the fund comes into existence ; but that does not make it a charge. The sole question we have to determine on this part of the case is whether or not the transaction in question was a charge within the meaning of sect. 79, and the two cases referred to in the judgment of the learned judges of the Divisional Court appear to me to afford strong authority for the view—if any authority be required—that an assignment of a debt is something quite distinct from a charge or hypothecation. In this case, looking at the substance of the matter and having regard to the surrounding circumstances, I am satisfied that the learned judges were right in saying that this was not a charge and was therefore not avoided by the provisions of sect. 79 because it had not been registered. That disposes of the main question in this case, which is the one that I have attempted to describe. I have come to the conclusion that the learned judges of the Divisional Court were right in the view they took, and so far as that point is concerned the appeal will be dismissed.

Another point was, however, raised in the last five minutes of Mr. Sutton's argument : namely, that an order ought not to be made in favour of the receiver for the whole amount of £338, but that there should be a set-off against that sum of the £301 which was the expense to which the head contractors were put in order to complete that work which would have been completed by Messrs. Ashby, Warner if the transaction had gone through and if the head contractors had not, by parting with the business to a receiver, repudiated their liability to the subcontractors. I speak with some hesitation on a question of that sort, which depends on matters of equity, but we have had the opportunity of discussing the question with our learned brother GREENE, L.J., and know what he is going to say about it, and we have agreed that his view on that subject is to be taken as the view of the court. I think it had better be expressed in his words rather than in words which might be imperfectly used by a judge who is not so familiar as he is with the equitable principles involved. For these reasons, as I think, the appeal must be dismissed with costs.

GREENE, L.J. : I agree. The argument addressed to the Companies Act, 1929, s. 79, falls, as my Lord has said, into two parts. The first part was this : that the document of July 14, 1933, was a charge on the book debts of the company within the meaning of the section, using the word " charge " in the sense of an hypothecation. Now the document in question, upon its face, is nothing more than an absolute assignment of a part of a debt which was to fall due in the future. As an equitable assignment of part of that debt the document was, of course, indisputably effective. On the face of the document it contains no suggestion that

it is an hypothecation. I do not myself attach very much importance to that circumstance, because, as it is a document addressed to a third person, who is the debtor, namely the L.C.C., you would not expect it to record on its face the bargain between the contractor and the subcontractor as a result of which it came into existence. Whether that document is or is not a document of hypothecation must be ascertained by examining the bargain between the parties which brought it into existence. When that is looked at—and it is to be collected and inferred from the correspondence between the parties—and from the oral evidence it seems to me clear beyond the possibility of doubt that when that letter was given and taken the intention of the parties was that it should be a satisfaction of that amount of the debt, namely £338 9s. 11d., which appears upon its face. There is not only no suggestion in the correspondence or in the oral evidence that the parties regarded this transaction as a transaction of hypothecation, but also, when one looks at the probabilities of the case, there was no reason that I can understand why intelligent persons should regard it as such. The subcontractors were obtaining by that document the right of recourse against the L.C.C. by appropriate procedure and were giving up, if they were accepting it in satisfaction, a right against a company which was proved to be insolvent. Therefore, so far as I am concerned, it seems to me clear beyond question that this document was not an hypothecation, but was intended to be an absolute assignment of the specified amount in satisfaction of that part of the debt.

On that assumption Mr. Sutton bases his second argument on the section, and it is to this effect: that in the case of book debts a charge within the meaning of the section includes an equitable assignment of part of a book debt—and by assignment I mean an absolute assignment, not by way of hypothecation. Why he should confine that proposition to book debts and not extend it to all the other items of property mentioned in the section in respect of which the word “charge” is used, I for one was unable to follow. But the proposition involves this: that the word “charge” in this section is used in the sense of an equitable interest in a fund representing book debts. Let us see what that means. It means that if a person, being a creditor in respect of book debts, creates in respect of those debts an equitable interest in a third person, whether by assigning the whole, or by assigning a part, or by declaring himself a trustee of part, then the document, if any, by which that transaction is effected must be delivered to the registrar, together with the particulars prescribed by the section. I am dealing, of course, with documents which are not in their nature hypothecations, but rather documents under which the person in whom the interest is created receives an absolute interest in the whole or in part of the subject-matter affected.

That proposition has the merit of novelty as well as the element of

surprise, because I have never heard it suggested—nor is there a trace of a suggestion, so far as I am aware, in any authority or in any text book on the subject—that the scope of sect. 79 is to cover anything but what I may call security documents or documents effecting an hypothecation. The principle, if it were accepted, would produce far-reaching results, and I for one am quite unable to see how anything of the kind can be extracted from the language of the section. Indeed, if I may say so with respect to the sustained and learned argument of Mr. Sutton, if that argument had dealt with the language of the section which is the matter in hand instead of dealing with authorities where the word “charge” is used in quite different contexts, it could not have been maintained for quite as long as it was maintained. When the section is looked at, in my judgment it perfectly clearly deals, and deals only, with what I have ventured to call a security document, or document of hypothecation. I do not propose to examine in any detail the sections, or fascicles of sections, in which the word “charge” appears, but I may call attention to the fact that the concluding words of sect. 79 (1) are these :

When a charge becomes void under this section the money secured thereby shall immediately become payable.

I may also refer to two more sections in the same part of the Act. Sect. 84, which deals with the entry of satisfaction, says this :

The registrar of companies may, on evidence being given to his satisfaction that the debt for which any registered charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register. . . .

And, not to multiply further examples, it will be found that in one more section—sect. 82—which sets out the matters which are to be entered in the register in respect of charges which fall under the section, one of the matters to be entered is the amount secured by the charge. I need not go into this matter any further, but if judicial opinion is required, it will be found in the judgment of ROMER, L.J., in *Re George Inglefield, Ltd.* (4) in a passage beginning at p. 27. I do not cite it, but the learned Lord Justice there, in dealing with a case which it was alleged fell under the section, draws the distinction between transactions of sale, which do not fall under the section, and transactions of mortgage or charge, which do ; and he examines the characteristics of the latter class as distinct from the former class, and shows exactly what the line of demarcation is. It is perfectly clear that the learned Lord Justice was dealing there with what is the real subject-matter of this section, and although the case with which he contrasts the mortgage or charge is the case of a sale, the reasoning applies to every case of absolute assignment, by which I mean a non-hypothecation assignment, whether it be by way of a sale for cash, whether it be made in consideration of the release of a debt, or in consideration of a transfer of property, or for any other considera-

tion whatsoever. There is no magic in the word "sale"; the true distinction is between the absolute assignment of the whole or part of a debt, and the assignment by way of hypothecation.

Mr. Sutton referred to a number of cases in which the person who has received either a total or a partial assignment of a debt which only operates in equity is described in the judgments of learned judges as being entitled to a "charge" upon the fund. That express word, used in that context, really means nothing more than this: that, as a result of the transaction, the claimant has got something more than some merely personal right; he has got an interest in the specific fund in this sense, that he is entitled to go to a court of equity and demand that the fund be administered in such a way that he will receive out of it payment of the amount which has been assigned to him. The position of a person who is entitled to such a right is described in many cases and in current language as the position of a person holding an equitable charge on the fund. The word "charge" in that context does not, of course, include any conception of hypothecation, or anything of the kind; it simply means that he has an equitable right against the fund as distinct from a merely personal right against an individual with whom he has dealt. It seems to me that to endeavour to extract, from those authorities using the word "charge" in a totally different context, authority for the proposition that the word "charge" in this section of this Act of Parliament covers this sort of case, is quite unwarranted. I say no more about that part of the case.

With regard to the last proposition, I must confess that I had some little difficulty in following it, but it appears to be of this nature: that in order that the subcontractors should be able to obtain payment of the amount specified in the letter of July 14, it was essential that the contract with the L.C.C. should be completed; because, unless it was completed (it is said), the result would be that the county council would never pay and therefore the fund out of which the £338 was to be paid would never come into existence. And it is said that, in so far as it was by means of moneys provided by the receiver that the contract was completed and the fund came into existence, there is some equity in the receiver to say that the subcontractors are to give credit for the amount which the receiver has expended in that way. I have endeavoured to understand on what principle such an equity can be said to be based, and I am afraid that I have been unable to understand it. It is to be observed, when the circumstances of this case are looked at, that the receiver was taking up this attitude: he was saying: "The document written to the L.C.C. was written without the authority of the board of directors of the company, and I repudiate it; and, what is more, I propose to go on and get this contract finished, and I am preparing to do so."

And he invited the subcontractors to tender for the work.

If one inference is to be drawn from the correspondence and from the attitude of the receiver disclosed therein, it appears to me to be this : that the receiver thought that it was good business to take up that attitude. As he was repudiating the letter of assignment and going on with the work, the inference that I should draw would be this : that he was not doing it out of kindness to the subcontractors here, so that they could get payment, but he was doing it because he thought it was good business. And very good business it must have been, if he could have got the letter of assignment declared void for some reason, or got it out of the way, and had been able to complete the work for a lesser sum. The result would have been that he would have secured the moneys for his debenture holder, and I have not the faintest doubt that one of the reasons why he took up the attitude that he did take up in respect of the completion of the contract was that he thought he was going to benefit by it on behalf of his debenture holder.

There is this further matter to be remembered. The company was contractually bound to the L.C.C. to carry out that contract to a conclusion, and if it had not done so it would have committed a breach of contract. It is perfectly true that the L.C.C., if it had been minded to sue the company for that breach of contract, would not have obtained very much satisfaction if, as one supposes and as seems not improbable, the assets of the company had not been more than sufficient to satisfy the debenture holder. On the other hand, the receiver for a debenture holder, appointed in respect of a going business, is always, as anyone familiar with the practice in these cases knows, anxious if he possibly can to carry out any current contract of importance in order that the goodwill of the company—so much of it as remains—may not be completely destroyed by the repudiation of contracts of importance. If this court is to draw any inference as to the reasons why the receiver acted as he did, I for one would draw the inference that he did it simply and solely for what he thought was the benefit of his debenture holder. Why, in those circumstances, the receiver is entitled to turn round and say : “You are not entitled to the amount out of this certificate unless and until you give credit for what I, for my purposes, have chosen to spend,” I am afraid I am quite incapable of understanding.

The point was put, and I think it is substantially the same point, in rather a different way by Mr. Garland, who, as I understand him, framed it rather in this way : that it would be for some reason inequitable to allow these subcontractors to receive payment of the amount in question when they themselves had not completed the work. If the receiver thinks that his company has a claim against these subcontractors in damages for breach of contract in not completing the work, he is perfectly entitled, if he is so advised, to bring such an action. Whether I think he will

succeed upon it is another matter, having regard to the correspondence which took place. However, I need say nothing about that, because, whether or not the receiver, in the name of the company, has a claim in damages for breach of contract in respect of the non-completion of the work by the subcontractors, it seems to me quite impossible to suggest that that is any reason why the subcontractors' assignment, which they took, and took for value, at the time, should not be given its full effect. The receiver cannot alter the nature of that document; he cannot alter the rights of the subcontractors under it. If there be any cross-claim in damages for breach of contract, it is not one to which effect can be given in these proceedings.

I hope I have done justice to that point, as put both by Mr. Sutton and by Mr. Garland. If there be any difference between the two arguments that I have not appreciated, it is no doubt my fault for not having followed as clearly as I ought to have followed the way in which the matter was put. If, however, there be any difference, my view is that on neither head is there any right in the receiver to claim to have credit in account for the expense to which he was put in respect of the work. Nor is he entitled to say that the subcontractors are not entitled to payment, in view of the fact—if fact it be, or in so far as it be a fact—that they did not complete the whole of the contractual works. I agree that the appeal should be dismissed with costs.

SCOTT, L.J. : I agree, and have nothing to add.

Appeal dismissed with costs. Amount of claim ordered to be paid out of court.

Solicitors : *Alfred C. Warwick & Co.* (for the appellant) ; *Pritchard, Englefield & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Re SPOLLON AND LONG'S CONTRACT.

[CHANCERY DIVISION (Luxmoore, J.), April 24, 27, May 28, 1936.]

Sale of Land—Open contract—Insufficiently stamped deed—Statutory declaration—Declaration contradicting prima facie title—Deed not shown by abstract to be stamped—Production by vendor.

It appeared from an abstract of title that a deed was insufficiently stamped. On inspection of the original deed, however, the amount of the consideration was seen to have been altered from an amount for which the deed was sufficiently stamped. The vendor offered a statutory declaration declaring that the alteration was made after the execution of the deed, but the declarant did not depose to that statement of his own personal knowledge, nor was the original draft of the deed exhibited to the declaration :—

HELD : (i) the vendor had not made a good title.

(ii) the statutory declaration was insufficient.

(iii) a purchaser under an open contract ought not to be compelled to accept a statutory declaration directed to contradict the *prima facie* title as shown by the deeds themselves.

Upon the same title it did not appear from the abstract what was the amount of the stamp upon an earlier assignment. Requisitions as to this were made and persisted in but not answered. Later correspondence was continued upon the first matter but this question was not again referred to :—

HELD : (iv) the vendor was bound to secure the production of the original deed to show the amount of the stamp duty paid thereon and the absence of reference to this matter in the later letters did not amount to a waiver of this requisition.

[EDITORIAL NOTE.] A purchaser is entitled under an open contract to have every document of title sufficiently stamped. The point raised in the present case is, however, the question of what is sufficient proof that a document is sufficiently stamped, when it appears upon the abstract to be insufficiently stamped. Apart from stamping the document correctly, this could only be done by statutory declaration. It is, however, difficult to see how the declaration would not be contradictory of the *prima facie* title shown by the deeds themselves and therefore one which according to the decision herein the purchaser would not be bound to accept under an open contract. Generally speaking, however, contracts for the sale of land are now subject to special conditions.

AS TO STAMPS ON DOCUMENTS OF TITLE, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 338, para. 567, and FOR CASES, see DIGEST, Vol. 40, p. 165, Nos. 1344-1347.]

Cases referred to :—

- (1) *Doe d. Tatum v. Catmore* (1851), 16 Q.B. 745 ; 17 Digest 226, 401.
- (2) *Re Halifax Commercial Banking Co., Ltd., & Wood* (1898), 79 L.T. 536 ; 40 Digest 159, 1280.
- (3) *Davidson v. Cooper* (1844), 13 M. & W. 343 Ex. Ch. : 12 Digest 365, 3038.

VENDOR AND PURCHASER SUMMONS taken out by Sidney Spollon, the vendor of certain property at 7, Chain Walk, Lozells, Birmingham, asking that the requisitions of the purchaser of the said property, Thomas Long, had been sufficiently answered by the applicant and for a declara-

tion that a good title had been made to the property in accordance with the contract. The contract of sale which was an open contract was dated Sept. 15, 1935, and the purchase price was £190, the purchaser paying a deposit of £10. The abstract of title was duly delivered by the vendor to the purchaser who made a number of requisitions on it, three of which, Nos. 1, 4 and 5 were outstanding at the date of the issue of the summons herein, and these were reduced at the hearing to two by the withdrawal by the purchaser's counsel of No. 5. Requisition 1 was directed to the stamping of a deed of assignment dated July 2, 1912, and appearing on the abstract as part of the vendor's title. The consideration for that assignment purported to be £75 12s. 6d., and if that were so the stamp on the document of 2s. 6d. was insufficient. It appeared, however, on examination, that the amount of the consideration in the assignment had been altered from £22 12s. 6d. to £75 12s. 6d., and the vendor, after correspondence with the purchaser, proposed to prove that the alteration had been made after and not before execution of the deed by means of a statutory declaration to be made by a Mr. Green, who had been a partner in the firm of solicitors who had acted for the purchaser in the transaction resulting in the execution of the assignment of July 2, 1912. The purchaser refused to accept the statutory declaration as drafted on the ground that it was insufficient and because the original draft of the assignment of July 2, 1912, was not attached to it, but his solicitor offered to see Mr. Green, if the vendor would pay his costs. That the vendor refused to do, but he procured from Mr. Green a more specific statutory declaration which, however, was not actually delivered to the purchaser until after the issue of the summons. On the first occasion when the summons came before him the learned judge said that the main point arising out of it was whether a statutory declaration, even though it was sufficient in form, could be forced on an unwilling purchaser.

Requisition 4, which was followed by two further requisitions, asked for information as to the stamp on a deed in the abstract dated Jan. 11, 1912, but the questions arising therefrom were never answered by the vendor to the satisfaction of the purchaser, who claimed that on this ground also he was entitled to rescind the contract.

G. P. Slade for the applicant, the vendor: I agree that I have to prove that the alteration in the assignment of July 2, 1912, was made after and not before execution of the document. But, assuming the fact is proved that the alteration was made after execution, there is no defect of title. See *Davidson v. Cooper* (3). Therefore, if the alteration is proved to have been made after execution that disposes of the stamp difficulty.

The statutory declaration which was offered by the vendor proved conclusively that the alteration was made after the execution of the

deed, and it was quite unnecessary that the original draft assignment should be exhibited, since it was sufficiently identified by Mr. Green, or that the purchaser's solicitor should see Mr. Green. As to the costs claimed by the purchaser in this connection, although the expenses of obtaining information and of providing the material for a statutory declaration falls on the vendor, the actual expense of the statutory declaration is a matter which the purchaser has to pay under the Law of Property Act, 1925, s. 45, and under the general conditions as to obtaining evidence not in the vendor's possession.

On the question whether a purchaser can be forced to accept a title which depends on a doubtful fact, where the only proof which can be offered is a statutory declaration, the only authority I have been able to find is one which suggested that, in a case where there was a lost deed and the vendor had to prove the due execution of it, a purchaser might be forced to accept a statutory declaration. See *Re Halifax Commercial Banking Co., Ltd., & Wood* (2). That is sound in principle and there should be no distinction in principle between proof of a lost deed and proof of any fact appearing on the abstract.

LUXMOORE, J. : It seems to me that it is quite a different thing where you want to compel a purchaser to accept some evidence which contradicts the title shown on the abstract.

Fergus D. Morton, K.C., and *W. G. H. Cook* for the respondent, the purchaser : At the time this summons was issued a title had not been made out. With regard to requisition 1, I do not dispute that the deed of July 2, 1912, passed the legal estate, but it is on the face of it insufficiently stamped and that is a vital defect. It is not enough for the vendor to say that he can produce evidence to contradict what appears on the face of the abstract for several reasons. (a) A purchaser who buys on an open contract is entitled to be in a position to sell on an open contract, and the purchaser here has not got a marketable title if he desires to resell on an open contract. He would have to have special conditions which his purchaser might not like. (b) If the purchaser had to prove his title in any legal proceedings, such as ejectment proceedings, he would have to pay a penalty or prove that the assignment was a forged document, and, even if the statutory declaration were sufficient now, the deponent might be dead at the time of such proceedings and it is questionable whether the statutory declaration, in those circumstances, would be evidence at all. (c) Not only does this assignment relate to title, but, as it is more than 20 years old, it would be of great value in entitling the purchaser to prove earlier facts.

The statutory declaration which was offered before the summons was taken out was not satisfactory.

LUXMOORE, J. : I think the declaration in its first form was thoroughly insufficient.

Fergus Morton, K.C.: Even the later one is not really satisfactory. Mr. Green merely says that his firm was concerned in the execution of the assignment. He does not say that he personally attended to the matter. Requisition 4 has not been answered or withdrawn. The draft assignment was submitted by the purchaser subject to outstanding requisitions.

Slade in reply: Whatever the position may have been before the issue of the summons, the second statutory declaration does state in full what the circumstances were. The purchaser is not entitled to rescind merely by reason of requisition 4. Although, as long ago as Oct., 1935, the purchaser said he was not prepared to accept the title, there has been a long correspondence since between the parties, in which no mention was made of this requisition, and the plaintiff said nothing about rescission on this ground in his affidavit in reply to the summons. The matter was dealt with before and after the issue of the summons on the footing that requisition 1 was the only one outstanding.

LUXMOORE, J.: On Sept. 13, 1935, the applicant, Sidney Spollon, agreed to sell to the respondent, Thomas Long, who agreed to purchase it, certain leasehold property situate in Birmingham, known as No. 7 Chain Walk, Lozells, Birmingham, for the unexpired portion of a term of 68 years from June 24, 1899, at a ground rent of £9 9s. per annum. The purchase price was £190 and a sum of £10 was paid as deposit. The contract is an open contract and there are no special or general conditions applicable to it. This summons has been taken out under the provisions of the Law of Property Act, 1925, by the vendor Sidney Spollon. It asks (a) for a declaration that the requisitions and objections of Mr. Long, the purchaser, in respect of the property comprised in the contract have been sufficiently answered by the applicant; (b) a declaration that a good title to the property has been made in accordance with the contract; and it asks that Mr. Long, the purchaser, may be ordered to pay the costs of and incident to this application.

An abstract of title was delivered in due course to the purchaser's solicitors, and contained a proper abstract of a deed of Jan. 11, 1912. On Oct. 12, 1935, the purchaser's solicitor sent in his requisitions of title and, I think on the same date, submitted a draft assignment for approval. The submission of the draft was expressed to be subject to the requisitions of title. The material requisitions are Nos. 1 and 4. At the date when the summons was issued the matter raised by requisition 5 was still outstanding, as the purchaser had refused to accept the vendor's answer to that requisition. But this requisition was withdrawn by Mr. Cook, who appeared for the purchaser, during Mr. Slade's opening of the summons when it was before me on Apr. 24. No more has been heard of that requisition, and I need not refer to it again.

Now requisition 1 was in this form :

According to the abstract the stamp on the assignment of July 2, 1912, is 2s. 6d. Assuming the abstract is correctly marked this deed would appear to be insufficiently stamped as the consideration is £75 12s. 6d. Any rectification necessary must be done prior to completion.

Quite obviously, this was a proper requisition to have made, for, if the consideration for the assignment was £75 12s. 6d., the deed is insufficiently stamped. This point was not dealt with in a further requisition, but was the subject of considerable correspondence between the parties. On Oct. 24, the vendor's solicitors wrote to the purchaser's solicitor, enclosing a copy of a letter from another firm of solicitors, Messrs. Lowe & Jolly. This firm had apparently acted for the purchaser under the assignment of July 2, 1912. The copy is of a letter dated Oct. 19, 1935, from one Bernard Green, who was a partner in the firm of Lowe & Jolly. The letter states that, from evidence in the possession of the writer's firm, which evidence is specified in the letter, the consideration paid for the assignment of July 2, 1912, was £22 12s. 6d. and not £75 12s. 6d. The letter contains this statement :

The deed was evidently engrossed by the law stationer and no material alteration was made in it, except (if I remember rightly) that a superfluous word was struck out and initialled by me. It is, I think, obvious that if I initialled a minor alteration of this kind *a fortiori* I should have initialled a very material alteration in the amount of the purchase money. I hope this will enable you to satisfy the purchaser's solicitors.

On Oct. 29, 1935, the purchaser's solicitor wrote that his client was not prepared to proceed with the matter and to accept a title "which is palpably defective." In reply it was suggested that the draft assignment had been approved and consequently that the title must be accepted. It is claimed that that contention could not be relied upon because the assignment was subject to the requisitions which had been made, and on Oct. 31, 1935, the purchaser's solicitor pointed that out and stated :

I am not prepared to advise my client to accept a title involving the acceptance of a deed which is either incorrectly stamped or which has since execution been altered.

On Nov. 7, 1935, the vendor's solicitors wrote to the purchaser's solicitor :

Now it is obvious that the deed has, subsequently to the completion of the transaction, been altered, by whom and for what purpose, we cannot say, and we have no means of finding out. This alteration does not affect or vitiate the title. A good, marketable title has been shown in our client, and even if we could find out why the deed has been altered, it would not make any difference as the legal estate is in our client.

If, after this explanation, you still persist in your objection, we shall take out a vendor and purchaser summons to decide the point.

In my view the contention set out in that letter is incorrect. The assignment of July 2, 1912, has been produced to me. It is, I think, plain that there is an alteration in the amount of the consideration. In such a state of affairs there is, in the absence of any evidence to the contrary, a presumption that the alteration was made before execution. If any authority is needed for that I refer to *Doe v. Catomore* (1). In that case the deed on which the plaintiff's title depended appeared to have an interlineation and erasure in parts not material, and objection was made that the deed was void, unless the plaintiff gave evidence to show when the alterations were made.

It was left to the jury to say whether the alterations were made before the execution of the deed, and it was found by the jury that they had been so made. In moving for a new trial it was contended that the question should not have been left to the jury without some evidence besides the deed itself, and LORD CAMPBELL, C.J., delivering the judgment of the court, at p. 746, referred to what was said in COKE UPON LITTLETON in these terms: "In CO. LIT. 225b it is said that: 'Of ancient time if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be void. But of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the delivery.' In a note (1) [136] upon this passage in HARGRAVE & BUTLER's edition of COKE UPON LITTLETON, it is laid down; 'Tis to be presumed, that an interlining, if the contrary is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. A deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is against fraud or wrong."

That being so the deed of July 2, 1912, in this case, apart from any evidence, would be a proper deed but insufficiently stamped. But the vendor was anxious to displace this presumption because, unless or until he was able to do so, it was plain that the assignment was improperly stamped. In other words the vendor was seeking to contradict the *prima facie* presumption arising from the deed itself, a deed which, of course, is a link in the vendor's own title.

On Nov. 11, 1935, the purchaser's solicitor replied to this letter that his client was not prepared to complete. He writes this:

I feel bound to advise my client that the vendor has not shown a marketable, or even a good title, and in these circumstances my client is not prepared to complete. In view of the purchase money involved, I am prepared to do anything within reason to avoid litigation between our respective clients, but if you think a vendor and purchaser summons justified, I am willing to accept service on behalf of the purchaser.

I should say, of course, that the purchaser having agreed to purchase on an open title was entitled to have a good marketable title which, as

I understand it, is a title which will enable him to sell the property without the necessity of making special conditions of sale restrictive of a purchaser's rights.

Nothing, I think of substance, happened after Nov. 11, 1935. There was a correspondence which started in answer to the letter of that date which is headed "Without prejudice," and there is no doubt that after that date suggestions were made to remove the difficulty. I should say, of course, that the question of the proper stamping of a deed is an important matter of title, because, if the owner of the property is called on either to defend his right or to attack a wrong-doer with regard to the property, it is necessary for him to be able to produce his title deeds in evidence without further trouble. If there had been an improper stamp on any one of these documents it would be a matter of serious importance. Either the owner of the property must pay the penalty, or he must prove that, if the stamp is not in accord with the consideration paid, there has been some alteration in it.

On Dec. 4, 1935, the purchaser's solicitor wrote asking what steps were being taken, and on Dec. 13, 1935, the vendor's solicitors replied, asking whether the purchaser would go on with the matter if the gentleman to whom I have already referred, Mr. Green, would make a statutory declaration in support of the facts set out in his letter of Oct. 19. To this Mr. Parker replied that, on receipt of the statutory declaration he would be prepared to consider the position, adding "but of course I cannot commit my client without considering the exact wording of the document which you suggest."

To this there was a reply of Dec. 31 :

We have not yet approached Mr. Green, but we have no doubt that he will be prepared to make the declaration verifying the facts in this matter and we enclose a draft of the suggested declaration for your perusal. If you will return one copy to us approved we will approach Mr. Green.

Mr. Parker wrote in reply asking, before the matter went further, that the vendor's solicitors should ascertain whether Mr. Green was prepared to make the declaration suggested, and stating that he would be glad to know whether they proposed to offer any explanation of the apparent forgery constituted by the alteration of the consideration. The vendor's solicitors replied that there was no doubt that Mr. Green would make a declaration with regard to the alteration of the assignment, and that they had nothing further to add to what they had already said. On Jan. 7, Mr. Parker replied :

I am advised that in any event a declaration such as the one you suggest would not be complete without the original draft assignment being exhibited thereto and I shall be glad if you will let me know whether this can be done. Have you approached Mr. Green with regard to making a declaration ?

In answer to that the vendor's solicitors said :

We are in communication with Mr. Green and will write you again in due course.

There was a communication from the vendor's solicitors to Mr. Green, and apparently they ascertained that Mr. Green was willing to make a statutory declaration. He appears to have written to the purchaser's solicitor, and as a result Mr. Parker wrote to the vendor's solicitors asking whether it would facilitate matters if he was to see Mr. Green and endeavour to agree a form of statutory declaration. He goes on to say : " If you think this desirable, I have no objection, but of course I shall expect your client to pay my costs for so doing." The answer to that was :

We have done everything we possibly can, short of meeting your demand for costs, in order to satisfy you and your client, and to bring about completion of this long-delayed matter, but our client will not pay your costs and your demand for same is unwarranted.

At this point a draft of a statutory declaration had been sent to Mr. Parker, the purchaser's solicitor. The declaration in the form in which it was sent was obviously, I think, quite insufficient, but of course the first question to be determined is whether the purchaser could be compelled, in any circumstances, to accept a statutory declaration, in a case where the vendor on an open contract was seeking to contradict the *prima facie* facts, as they appear from the title which he has deduced in his abstract. As I have already said, apparently on the face of the abstract there was a flaw in the title in the sense that there was an insufficiently stamped deed.

Now in my judgment, on looking at a title in a case of that kind, it is not open to a vendor to insist on a purchaser accepting a statutory declaration, or other evidence which is put forward for the purpose of contradicting something which would *prima facie* be the state of facts existing from the abstract itself. Of course, there are cases in which a vendor can insist on a purchaser accepting a statutory declaration with regard to certain facts which appear on the abstract and which contradict the evidence offered by the abstract. It may also be that in the case where title deeds are lost a purchaser may be compelled to accept a statutory declaration. Certainly it would appear from the decision in *Re Halifax Commercial Banking Company, Ltd., & Wood* (2), that in a proper case such a declaration might be forced upon a purchaser on an open contract. The actual decision in that case does not go as far as that, but it certainly would appear as if the opinion of the Court of Appeal was that such a statutory declaration might in the circumstances be forced upon a purchaser. But a decision on that point was not necessary to the disposal of the particular case, and I do not think it is necessary for me to express any opinion with regard to it. So far as

I am concerned, the present case seems to me to be wholly different from a case of that kind, because, as I have already said, the vendor is selling on an open contract, and a purchaser, of course, has no idea when he goes into such a contract that there will be any defect of this kind, and that he will be met, when he raises a proper objection to the title, which on the abstract is clearly defective, by the answer : " Oh, although it appears from the abstract that this document is improperly stamped, in fact I can give you certain information that it is not." I cannot think that it would be right for a court, in a specific performance action, to compel the purchaser, who has purchased on an open contract, to take a title of that kind, because no man, purchasing property on such a title with such a defect, and with such a set of circumstances applying to it, could prudently or properly resell the property on an open contract. As I understand it he cannot resell on an open contract where, when he has bought on a similar contract, his vendor is not in a position to make him a title in accordance with that open contract.

Now after the original statutory declaration had been delivered, this summons was taken out on Jan. 24, 1936, and, after the summons had been taken out, the vendor submitted a statutory declaration in a different and more enlarged form. The declaration, as submitted after Jan. 10, 1936, was certainly fuller and more clearly directed to the elucidation of the difficulty which had arisen. But even this declaration does not state that the declarant had personal knowledge of the actual facts he was stating, and it was submitted in argument that as the original declaration, which had stated that the declarant was concerned as solicitor for the purchaser to the particular deed, was altered when the later declaration was made, and the statement became " my firm, concerned as solicitors," there certainly could be some doubt in the purchaser's mind as to whether the declarant was a person able to state the facts in the declaration of his own knowledge.

In my judgment the vendor has not properly answered the requisition which was raised by the purchaser's solicitor with regard to this matter, and, so far as I am concerned, I do not think, having regard to the fact that this was an open contract, that the purchaser ought to be compelled to accept the statutory declaration, which on the face of it, was directed to contradict the *prima facie* title as shown by the deeds themselves.

The matter with regard to the assignment of Jan. 11, 1912, which was the subject of requisition 4, appears to be as follows : The original requisition asked this :

What is the amount of the stamp on the abstracted assignment of Jan. 11, 1912 ?

Answer :

We cannot supply you with this information.

This matter was dealt with by a further requisition in these terms :

The reply to requisition 4 cannot be accepted. The document in question is abstracted, and the abstract is not complete until this information is given.

The answer to that was :

We have nothing to add to our former reply.

On Oct. 21, 1935, Mr. Parker sent a further requisition arising out of the replies to the original and further requisition, saying this :

If the vendor is not prepared to furnish particulars of the stamp duty on the document referred to in original requisition 4 the purchaser must insist on being informed in whose possession this document now is so that the stamp thereon may be checked.

To that there was no reply.

Now obviously the purchaser was right in making this requisition. It does not appear from the abstract before me that there was any acknowledgment of the right to production of this particular document in the deed of July 2, 1912, but I am told that the last-mentioned document does in fact contain such an acknowledgment. Whether it was so or not it was the vendor's duty to obtain production of the document and to obtain the information with regard to the amount of the stamp on that document if the purchaser required it, and it may be that the purchaser would have to pay the cost of the vendor's complying with his request.

It was suggested that the purchaser had waived this requisition, because there is no reference to it in the correspondence, nor is there a further set of requisitions sent in which it is again raised. I do not think, having regard to the whole of the circumstances in this case, that it would be possible for me to hold that there had been any waiver of this requisition, and I think it is clear that I must hold that this requisition has not been sufficiently dealt with.

A question arises as to whether the contract had been rescinded by the purchaser before the summons was issued. The question is not in fact raised by the summons which is before me. But, having regard to the small amount of the purchase money, and the position of the parties, it may be a mercy to them that I should state my view with regard to that. I have already referred to the material correspondence. The last of the letters which I think material is that which is dated Nov. 11, 1935, where the purchaser's solicitor, having previously, on Oct. 29, 1935, stated that his client had instructed him that he was not prepared to proceed with the matter or accept the title, wrote to the vendor's solicitors saying : " I feel bound to advise my client that the vendor has not shown a marketable or even a good title, and in these circumstances, my client is not prepared to complete," and demanding

the return of the deposit and the payment of the costs of investigating the title by the vendor.

I think the correspondence which took place after that date was correspondence which was entered into without prejudice and, on the view that I take of the matter, I should think that the better view was that Mr. Parker on behalf of his client, rescinded the contract on Oct. 29, 1935, and that from that rescission he had done nothing to alter the position of his client.

As I say, that matter does not arise on the summons before me. All that I have to do is to answer the questions as they appear on the summons. In my view the answer to both the questions is in the negative, with the result that the vendor has failed in the summons and he must pay the respondent's costs accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Howard, Cant & Cheattle*, Birmingham (for the applicant); *Douglas E. G. Fearn*, agent for *V. Geoffrey Parker*, Birmingham (for the respondent).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

RADIO PUBLICITY (UNIVERSAL), LIMITED *v.* COMPAGNIE LUXEMBOURGEOISE DE RADIODIFUSION and WIRELESS PUBLICITY, LIMITED (By original action) and COMPAGNIE LUXEMBOURGEOISE DE RADIODIFUSION *v.* RADIO PUBLICITY (UNIVERSAL), LIMITED, and RADIO PUBLICITY (LONDON), LIMITED (By Counterclaim).

[CHANCERY DIVISION (Clauson, J.), **May 22, 1936.**]

Arbitration—Foreign arbitration—Agreement containing arbitration clause—Submission—Action upon agreement—Discontinuance—Counterclaim by other party—Stay—Arbitration Clauses (Protocol) Act, 1924 (c. 39), s. 1—Arbitration (Foreign Awards) Act, 1930 (c. 15), s. 8—Arbitration Act, 1934 (c. 14), s. 14.

By an agreement between an English company and a Luxembourg company it was agreed that any disputes arising from the objects thereof should be settled by arbitration. Differences having arisen the English company commenced an action in the English courts claiming to enforce the agreement, but this action was discontinued. Correspondence ensued, in which the English company stated that it had chosen its arbitrator and setting out the questions to be submitted, and calling upon the Luxembourg company to name its arbitrator and state the questions it desired to be submitted to arbitration. The Luxembourg company appointed an arbitrator and stated that it would allege that the claim of the English company was inadmissible and then put in a counterclaim to the original action. The English company moved to stay all proceedings in the counterclaim pursuant to the Arbitration Clauses (Protocol) Act, 1924, s. 1, as amended by the Arbitration (Foreign Awards) Act, 1930, s. 8, or alternatively

pursuant to the Arbitration Act, 1889. The Luxembourg company opposed the motion contending that (i) there had been no "submission made in pursuance of an agreement to which the protocol applies" within sect. 1 of the Act of 1924; (ii) as certain terms as to times stated in the agreement had not been strictly complied with, the court was entitled to find that by effluxion of time the arbitration clause had become inoperative; (iii) as the agreement was in the nature of an appointment of an agent and the agency had been discontinued, the agreement itself had become inoperative and the arbitration clause with it; (iv) part of the counterclaim which alleged a conspiracy was outside the agreement and must be excluded from the stay; (v) as the English company, by issuing a writ, had elected to enforce its rights before an English tribunal, it could not then claim to enforce the arbitration clause, and (vi) the Arbitration Act, 1934, s. 14, had restored the discretion of the court to order an arbitration agreement to cease to have effect and that this was a proper case for the court to exercise that discretion:—

HELD: (i) the naming of their respective arbitrators and the constitution of the arbitration tribunal was a "submission" in pursuance of the agreement within sect. 1 of the Act of 1924.

(ii) any non-compliance with the terms as to times stated in the agreement had been waived by the parties coming together and being at one as to the constitution of the arbitration tribunal.

(iii) until all matters in dispute under the agreement had been duly settled, the agreement was still operative, notwithstanding that the relations, which the agreement had originally brought into being, had been discontinued.

(iv) the claim for damages for conspiracy was not a matter to which the arbitration provisions of the agreement extended and should be excluded from any stay.

(v) the Luxembourg company by its own conduct in sharing in the constitution of the arbitration tribunal had waived any right it may have had as a result of the election by the English company.

(vi) assuming that sect. 14 of the Act of 1934 applied, this was not a case in which the discretion of the court ought to be applied, and a stay should be ordered.

[EDITORIAL NOTE.] The terms of the Arbitration Act, 1889, have been adapted to the case of foreign arbitrations and awards by the Arbitration Clauses (Protocol) Act, 1924, and Arbitration (Foreign Awards) Act, 1930. This is the first time that these provisions have been considered at any length by the courts, and the application here is the common one in ordinary arbitrations for a stay of an action in respect of an agreement containing an arbitration clause. It is to be noted that in the case of the Acts here in question a stay must be granted where the facts allow it, but in the case of the Arbitration Act, 1889, the granting of a stay is discretionary.

FOR THE ARBITRATION CLAUSES (PROTOCOL) ACT, 1924, see HALSBURY, Hailsham Edn., Vol. 1, p. 643, para. 1091, and HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 1, p. 469, and FOR THE ARBITRATION (FOREIGN AWARDS) ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 4.]

Cases referred to :

- (1) *Ex p. Glaysher* (1864), 3 H. & C. 442; 2 Digest 315, 20.
- (2) *Scarf v. Jardine* (1882), 7 App. Cas. 345; 21 Digest 224, 577.
- (3) *Bartlam v. Evans*, [1936] 1 K.B. 202.
- (4) *Re Smith & Service & Nelson & Sons* (1890), 25 Q.B.D. 545; 2 Digest 386, 472.

MOTION to which the above-named Compagnie Luxembourgeoise de Radiodiffusion were made respondents by the above-named defendants, Radio Publicity (London), Limited, that all further proceedings in the counterclaim to the action against the defendant Radio Publicity (London), Limited, might be stayed pursuant to the Arbitration Clauses (Protocol) Act, 1924, s. 1, as amended by the Arbitration (Foreign Awards) Act, 1930, s. 8, or alternatively pursuant to the Arbitration Act, 1889.

By an agreement entered into by the applicants, an English company, and the respondents, a Luxembourg company, in 1933, the parties agreed that any disputes arising from the objects thereof should be settled by means of arbitration. Differences having arisen between the parties, the applicants started an action against the respondents which they discontinued, and there then ensued a lengthy correspondence in which the applicants named an arbitrator to act under the arbitration clause and called upon the respondents to do the same. On Mar. 18, 1936, the respondents appointed a named gentleman to act as their arbitrator, but stated that they would ask the court of arbitration to declare that the demands of the applicants were inadmissible and ill-founded.

Lionel Cohen, K.C., and A. Andrewes-Uthwatt for the applicants.

F. R. Evershed, K.C., Valentine Holmes and J. P. Ashworth for the respondents: (1) Although the agreement is one to which the Arbitration Clauses (Protocol) Act, 1924, applies, there is here no submission made in pursuance of an agreement to which the protocol therein referred to applies. On the correspondence between the parties there is nothing more than an agreement to appoint two arbitrators. There is no general authority to satisfy the terms of the Act. As to the difference between submission and agreement, see *Ex p. Glaysher* (1).

(2) Even if there was a submission, by Mar. 18, 1936, the time fixed by the agreement had expired, and a new agreement would have been needed to renew the jurisdiction. And even if there was a submission of all disputes on Mar. 18, it must have been upon the terms of the agreement as to time, and again time had expired.

(3) The agreement between the parties which contains the arbitration clause is a contract for agency and personal services, for which a decree of specific performance would not be granted.

(4) In any event, although remedies may still arise out of it, the agreement has become inoperative and has gone, and with it the arbitration clause has gone.

(5) The Arbitration Act, 1934, s. 14, restores the discretion of the court to order the arbitration agreement to cease to have effect, which was taken away by the Act of 1924, and this is a proper case for the court to exercise that discretion on the grounds: (a) as appears from their statement of claim the plaintiffs are making charges of fraud against the

respondents ; (b) a number of parties are involved in the present dispute not all of whom are parties to the submission ; (c) there is an allegation by the respondents against the applicants and a company called International Broadcasting Co., Ltd., of conspiracy ; (d) one learned judge having tried the action, it is convenient that he should proceed to try the counterclaim.

CLAUSON, J. : It looks to me as if there is something to be said for the view that this agreement operates under the law of Luxembourg. That being so, it would be difficult for the court here to interfere with an arbitration in Luxembourg operating under an agreement which is intended to operate under the law of Luxembourg.

Evershed, K.C. : (6) The applicants, by issuing a writ, unqualified in form, asking for a declaration, obviously selected an English tribunal as the one before which they wished to enforce their rights. That being so, they cannot now claim to enforce the arbitration clause. See *Scarfe v. Jardine* (2), *Bartlam v. Evans* (3).

(7) In any event that part of the counterclaim which alleges a conspiracy is outside the agreement and must be excluded from the stay.

Lionel Cohen, K.C. : (1) The term submission, in the absence of anything to the contrary, includes an agreement to refer, whether there are named arbitrators or not. See the definition of submission in the Arbitration Act, 1889, s. 27, and *Re Smith & Service & Nelson & Sons* (4). That being so, and as the protocol, to which Great Britain and Luxembourg were parties, and which is recited in the preamble to the Act of 1924, clearly intends that the stay imposed pursuant to the agreement therein recorded is to apply merely by reason of the fact that there is an agreement to refer present or future differences, whether an arbitrator has been named or not, the Act of 1924 should be construed so as to give effect to the intention of the protocol. Although, if strictly construed, the Act of 1924 may apply only to something done in pursuance of an agreement, the court has a sufficient discretion to apply the wider interpretation to that Act, since any other construction would disappoint the meaning of the preamble.

(2) As to whether there are matters outside the reference, the matters relied upon are contained in documents which are indicated in clause 6 of the main agreement. The only other possible matter is the allegation of conspiracy, but there is no sufficient allegation of conspiracy in the counterclaim, since there is no allegation of fraud and no allegation of damages.

CLAUSON, J. : This is a motion by a company whom it will be convenient to call R.P.L., who have been made defendants to a counterclaim in an action which was originally brought by a company which it will be convenient to call I.B.C., against a Luxembourg company

C.L.R., and another corporation, in which C.L.R. has made a counterclaim against I.B.C. and R.P.L. R.P.L. is asking that all further proceedings in the counterclaim against R.P.L. may be stayed, pursuant to the Arbitration Clauses (Protocol) Act, 1924, s. 1, as amended by the Arbitration (Foreign Awards) Act, 1930, s. 8, or alternatively pursuant to the Arbitration Act, 1889.

In the year 1933 an agreement was executed in Luxembourg between C.L.R., which is a Luxembourg company, and R.P.L., which is an English company with its offices in London. That agreement, which is of a complicated character, dealt with the appointment of R.P.L. to perform certain duties in England with regard to the business carried on in Luxembourg by C.L.R., which business consisted of making wireless announcements which, as I understand it, starting from Luxembourg penetrated into other parts of the world, including England. That agreement contains this provision in para. 12. The agreement is in French, but this paragraph I read in an amended translation which both parties agree, at all events for this purpose, is accurate. It is as follows :

Any disputes arising from the objects of the present agreement to be settled by means of arbitration. Such arbitration to be conducted under the following conditions. Within a fortnight of the dispute the parties will each appoint an arbitrator and define the objects disputed. These arbitrators immediately after their appointment will choose one referee.

Then various times are fixed for the delivery of the finding, and the paragraph continues as follows :

In the event of one of the parties failing to appoint an arbitrator, as also if either of the two arbitrators fails to choose a referee, such referee to be appointed by the President of the Civil Tribunal of Luxembourg at the request of the party that is the first to act.

It will likewise be referred to the President of the Civil Tribunal sitting as judge-referee in the event of a disagreement between the two parties in regard to the objects in dispute.

The arbitrators are not held to observe any particular rules of procedure. Their decision shall be final and they shall act as friendly mediators.

It appears that some time before the year 1924 a protocol was agreed to by certain contracting states, the material part of which is in these terms :

Each of the contracting states recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each contracting state reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any con-

tracting state which avails itself of this right will notify the secretary-general of the League of Nations, in order that the other contracting states may be so informed.

Great Britain became bound internationally by this protocol, as also did Luxembourg, and I need not trouble with the point as regards "contracts which are considered as commercial under national law," as everyone agrees, at all events for the purposes of this discussion, that the agreement in question is one which ought to be considered as commercial within the meaning of that phrase, both in Luxembourg and Great Britain.

Great Britain, having become bound by that protocol, an Act was passed in 1924 to give effect to the protocol, and it is, of course, with that Act and not the protocol, that I am concerned. The material portion of the Act, as amended by the Arbitration (Foreign Awards) Act, 1930, s. 8, is in these terms :

Notwithstanding anything in the Arbitration Act, 1889, if any party to a submission made in pursuance of an agreement to which the said protocol applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

The first point to be discussed is that the Act is one primarily differing in one respect from the familiar provisions of the Arbitration Act, 1889. It is not a question of the court having a right to stay proceedings, but the court is, in the circumstances stated in that section, to make an order staying proceedings. Another point to be discussed is this, that the case to which the section applies is a case where there is a submission made in pursuance of an agreement to which the protocol applies. It is suggested, and I do not propose to say, one way or the other, whether I agree with the suggestion, that, if there is an agreement such as I have here, with an arbitration clause such as I have here, the Act does not apply at once, but that it only applies when the parties to the agreement, in pursuance of the clause in that agreement which binds them to refer differences to arbitration, have become parties to a submission made in pursuance of the provision in question. The first point that I have to decide is whether, in this particular case, the party now applying to stay the proceedings is a party to a submission made in pursuance of an agreement to which the protocol applies. I have read the arbitration clause, and of course the respondents were a party to that arbitration clause. As to that there is no question. But what happened was this. First of all, the present applicants started an action against the present

respondents claiming to enforce the agreement. They started that action and then they discontinued it. Then a correspondence ensued which it is necessary for me to refer to in some detail. I will refer to it in the English translation. The representative of R.P.L. submitted to C.L.R. in a long letter, which I do not propose to read, that various circumstances had arisen which gave R.P.L. certain rights, by virtue of this agreement, against C.L.R., and the document states finally that R.P.L. chose as their arbitrator a Maitre Ribardiere, and that they proposed to submit to the court of arbitration certain questions which are stated. The document then calls upon C.L.R. to name an arbitrator, and to state what are the questions that C.L.R. will desire the court of arbitration to deal with. A question was raised at once whether, for various reasons, the gentleman whom R.P.L. proposed to appoint as arbitrator was a desirable person to appoint, and another person, a former President of the First Chamber of the Commercial Court of the Seine in France, was suggested as being a more desirable person to be appointed as arbitrator on behalf of R.P.L., and ultimately that gentleman was substituted for the originally named arbitrator, in a letter of Mar. 16, 1936, which again asked C.L.R. to communicate as soon as possible the name of the arbitrator to represent them, and to state the questions which they proposed to submit to the court of arbitration.

On Mar. 18, 1936, the representative of C.L.R. informed R.P.L. that they had appointed a gentleman whom they named to be their arbitrator, and in that letter come these words :

We shall ask the court of arbitration to declare that your demands are inadmissible, and in any case ill-founded.

I understand that to mean this, that, when the matter comes before the court of arbitration, C.L.R. propose not only to say there is no foundation for the complaints made, but also to claim that the matter in dispute is outside the proper ambit of the clause of arbitration. It is rather suggested that that letter amounts to an attempt, which, it is suggested, was successful, by the parties to set up the arbitration tribunal, without prejudice to their saying that the arbitration tribunal was not properly set up and had no jurisdiction at all in the matter. I do not take that view. My view, as a result of the correspondence, is that the two parties in fact named their respective arbitrators and constituted the arbitration tribunal, and that, in my view, is a submission in pursuance of the agreement, a submission to a court which the parties have constituted as an arbitration court.

Under these circumstances it appears to me that the requirements of the Arbitration Clauses (Protocol) Act, 1924, s. 1, so far have been complied with. There is an agreement to which the protocol applies. There is a submission made in pursuance of the agreement that entitles

the present applicants to apply to this court to stay proceedings in this country, and I must stay the proceedings unless I am satisfied that the agreement to arbitrate has become inoperative or cannot proceed.

It is suggested that, owing to the fact that certain times, which are stated in clause 12 of the agreement, have not been strictly complied with, I am entitled to find that the arbitration has become inoperative and cannot proceed. I do not take that view. It appears to me that any non-compliance with the terms as to times stated in clause 12 of the agreement has been waived by the parties coming together and being at one as to the constitution of the arbitration tribunal. If any difficulties arise as to the proceedings of the tribunal there appears to be machinery set up by clause 12 which will operate in Luxembourg to enable the tribunal to function properly. Then this point is taken. It is said that the agreement itself has become inoperative. It is said that this is an agreement of the nature of an appointment of an agent. That agency has been determined. The agreement no longer operates. It has come to an end. There were contractual rights under this agreement and the results of those contractual rights may have to be determined, but at the moment the agreement is inoperative. I do not take that view of the matter. It appears to me that, where there is an agreement between the parties, which not only involves certain duties on each side, but also involves an agreement that disputes shall be settled by arbitration, until all matters in dispute under the agreement have been duly settled, the agreement is still perfectly operative, although it may be that an end has been put to the relations which the agreement originally brought into being between the two parties. So in my view that argument fails.

I do not think it was suggested that there was not in fact any dispute between the parties. Accordingly it appears to me that I am bound, in these circumstances, to make an order staying proceedings, in so far as the proceedings deal with matters which are properly referable to the arbitration tribunal under the terms of clause 12 of the contract. It is suggested, however, that the counterclaim covers certain matters which are not within the terms of the clause of reference, and that may be so. Part of the counterclaim is a claim for damages for conspiracy against R.P.L. and I.B.C. as co-conspirators, and I am not satisfied that that portion of the counterclaim is a matter to which the arbitration provisions of the agreement extend, and accordingly, assuming that I make an order staying proceedings under the counterclaim, I should add this proviso, that the counterclaim is stayed save in so far as the defendants, the plaintiffs to the counterclaim, thereby claim damages for conspiracy against R.P.L. as co-conspirators with I.B.C.

There is, however, some further matter with which I have to deal. The Arbitration Clauses (Protocol) Act was passed in 1924. In 1934 the Arbitration Act of 1934 was passed, and my attention has been drawn

to sect. 14 of that Act. But before I come to that section there is one further point which I think perhaps it would be desirable that I should mention at this stage. It was said that, by reason of the fact that the present applicants had started an action in England to enforce their rights under the agreement, which action they subsequently discontinued before this counterclaim was put in, that they have elected to treat the English courts as the forum to determine this matter, and that they ought not, therefore, to depart from that election and now insist on the reference to arbitration. All I need say about that point is this. Assuming for a moment that there was such an election, and I do not say one way or another whether that is the right way to describe what was done, it appears to me that any right which the present respondents might have had, on that ground, to object to a court of arbitration and a submission to arbitration, has been waived by their own conduct, because they, knowing of that alleged election, since they were parties to the action which was discontinued, nevertheless submit to arbitration by sharing in the constitution of the arbitration court. So even if there was ever anything in the point that there was an election by R.P.L. which might have prevented them now claiming to have the matter tried by an arbitrator, it seems to me that it must be treated as having been waived by C.L.R.

I now turn to the Act of 1934, s. 14, which says this :

(1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality.

(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred and a dispute which so arises involves the question whether any such party has been guilty of fraud, the court shall, so far as may be necessary to enable that question to be determined by the court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder.

(3) In any case where by virtue of this section the court has power to order that an arbitration agreement shall cease to have effect or to give leave to revoke a submission, the court may refuse to stay any action brought in breach of the agreement.

Now I have no application before me by the respondent under that section. Nevertheless, as the point has been raised, I may just as well deal with it. It has been suggested that sect. 14 gives the court power, so to speak, to put an end to an agreement for arbitration, even an

agreement to which the Protocol Act applies. I am not myself convinced that that is a correct view. However, I do not propose to decide that point. It is far too important a point to be decided by way of a side issue. I propose to assume for the moment that sect. 14 does apply. There is no doubt that, in connection with this agreement, C.L.R. have made charges against R.P.L. in this counterclaim which it is probably correct to say, or which I will assume it is correct to say, import fraud on the part of the R.P.L. It is suggested, and I think there is something in it, that in the language used by R.P.L. in their complaints leading up to the arbitration, charges are brought against C.L.R. which come within such a description. I think again that may be so. But even so, in a matter of this kind, where in an international agreement of this sort there is a clear reference to arbitration proceedings in a foreign country, or, at all events, under the control of a foreign tribunal, and especially where, as in this case, there is a provision which is aimed at giving power to the arbitration tribunal which is a good deal wider than the power which is usually given by arbitration clauses to arbitrators in accordance with English law—I refer to the last clause in para. 12 of the agreement :

The arbitrators are not held to observe any particular rules of procedure. Their decision shall be final and they shall act as friendly mediators.

and I understand, according to Luxembourg law, that arbitrators are entirely unfettered by any legal considerations and must act only according to what they consider to be general principles of justice—having regard to that, I should myself hesitate long, even if I had a discretion, which I am assuming for this purpose I have under sect. 14, to revoke the arbitration clause, before holding that this is a case in which I ought to exercise that discretion.

I think I have now dealt sufficiently with all the various points that have been raised. It is perhaps best that I should not go too elaborately into the details of the matters in dispute, in view of the fact that this is an early stage of proceedings which may be going on. It is sufficient to say that, in my opinion, the only course I am in a position to take here is that I should stay proceedings on the counterclaim, save in so far as the defendants to the counterclaim thereby claim damages for conspiracy in connection with the agreements alleged to have been entered into as co-conspirators by R.P.L. and I.B.C.

The only question which remains is as to how I am to deal with the costs of this present application, as to which I think I must say that the costs of the applicants must be taxed and paid by the respondents.

Solicitors : *Parker, Garrett & Co.* (for the applicants); *Slaughter & May* (for the respondents).

INLAND REVENUE COMMISSIONERS v. PEARSON.
INLAND REVENUE COMMISSIONERS v. PRATT.

[KING'S BENCH DIVISION (Lawrence, J.), May 28, 1936.]

Income Tax—Tax-free dividend—Amount of income for purposes of sur-tax—Finance Act, 1931 (c. 28), s. 7 (2).

A cheque for dividends declared upon certain shares held by a tax-payer was accompanied by a letter stating that the company had not exercised its statutory but optional right to deduct income tax when paying these dividends and that therefore the dividends were being paid in full and stating the amount that would have been deducted if the deduction had been made. In another case a cheque for dividends declared upon certain shares held by a tax-payer was accompanied by a warrant which stated: "Gross dividend . . . £3,150. Amount actually paid, £3,150. I hereby certify that income tax on the profits of the company, of which profits this dividend forms a portion, has been or will be, duly paid to the proper officer for the receipt of taxes":—

HELD: in both cases the taxpayers were bound to bring in for sur-tax the gross amount of the dividends plus income tax.

[EDITORIAL NOTE.] This is a further attempt to bring the facts of a case within the position accepted by the House of Lords in *Neumann v. Inland Revenue Commissioners* (1) and to obtain an assessment to sur-tax upon the net amount received and not upon a gross amount made up of the amount received and the income tax thereon. The matter was before the court on the question of an annuity in *Shrewsbury (Countess) v. Inland Revenue Commissioners*, [1936] 2 All E.R. 101; but the question here is of even greater importance, because the amounts in question are what are commonly called tax-free dividends.

AS TO THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 250, 251, paras. 507, 508; and FOR CASES, see DIGEST Supp.]

Cases referred to:—

- (1) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; 18 Tax Cas. 332; Digest Supp.
- (2) *Ashton Gas Co. v. A.-G.*, [1906] A.C. 10; 10 Digest 1162, 8225.
- (3) *Samuel v. Inland Revenue Comrs.*, [1918] 2 K.B. 553; 7 Tax Cas. 277; 28 Digest 110, 680.
- (4) *Michelham's Trustees v. Inland Revenue Comrs.* (1930), 144 L.T. 163; 15 Tax Cas. 737; Digest Supp.
- (5) *North British Ry. Co. v. Scott*, [1923] A.C. 37; 8 Tax Cas. 332; 28 Digest 88, 514.
- (6) *Hartland v. Diggines*, [1926] A.C. 289; 10 Tax Cas. 247; 28 Digest 88, 506.

CASE STATED under the Income Tax Act, 1918, s. 149, and the Finance Act, 1927, s. 42 (7), by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts fully appear from the judgment.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellants.

Roy Borneman for the respondents.

LAWRENCE, J.: In these cases, which were heard together, the question is whether the respondents are bound to bring in for sur-tax

dividends which were declared by certain companies in which the respondents were shareholders without stating that the dividends were free of income tax, or less tax, at the declared amounts of the dividends, or at those amounts plus income tax.

In Pearson's case the facts were that at a meeting of the directors of the company held on Mar. 29, 1934, a resolution was passed, whereby it was resolved that :

a dividend of 10 per cent. on the preferred ordinary share capital of the company and also a dividend of 130 per cent. on the deferred ordinary share capital of the company be and are hereby declared and shall be paid forthwith.

On the same date, namely, Mar. 29, 1934, a cheque for £7,489 16s. was sent to the respondent. Accompanying the said cheque was a letter addressed to the respondent from the company, which said letter was in the following terms :

Dear Sir—I have pleasure in enclosing herewith a cheque for £7,489 16s., representing the amount due to you in respect of dividends declared on Mar. 29, 1934. This cheque is made up as follows : dividend of 10 per cent. on 9,898 preferred ordinary shares of £1 each, £989 16s. Dividend of 130 per cent. on 5,000 deferred ordinary shares of £1 each, £6,500 [which added up make £7,489 16s.]. Will you kindly observe that it has been decided that the company shall not exercise its statutory but optional right to deduct income tax when paying these dividends and that therefore the dividends are being paid to you in full. In order, however, to conform with the Finance Act, 1924, s. 33, I am to inform you that if the company had exercised its right to deduct income tax the appropriate rate would have been 5s. in the £, and the amount deducted would have been £1,872 9s. Yours faithfully, William Pearson, Limited.

In Pratt's case the facts were that on Jan. 24, 1934, the company declared a dividend in the following terms :

Resolved that a dividend of $7\frac{3}{4}$ per cent. be approved and paid or passed to the credit of shareholders' accounts.

On the same day the company sent to the respondent a voucher in the following form :

Jan. 24, 1934. Gross dividend of $7\frac{3}{4}$ per cent. on 40,000 shares in the above company for the year ending Dec. 31, 1933, £3,150. Amount actually paid, £3,150. I hereby certify that income tax on the profits of the company, of which profits this dividend forms a portion, has been or will be, duly paid to the proper officer for the receipt of taxes.

The case appears to me to be of some importance, as, if the decision of the commissioners is correct, any company can ensure that its shareholders shall only be taxable to sur-tax on the actual amount they receive in cash by declaring dividends without qualification. The commissioners have considered that the cases are governed by *Neumann v. Inland Revenue Commissioners* (1), and the question depends upon whether that case, or *Ashton Gas Co. v. Attorney-General* (2) is applicable.

It is argued for the Crown that the case is governed by the *Ashton Gas Co.* case (2), which has been followed and approved in *Samuel v. Inland Revenue Commissioners* (3), and in *Michelham's Trustees v. Inland Revenue Comrs.* (4), that *North British Railway Co. v. Scott* (5), and *Hartland v. Diggines* (6), support the same view ; that the decision in the *Ashton Gas Co.* case (2) was that a dividend not declared as free of tax was, in fact, a dividend of its stated amount plus the amount of income tax thereon ; that *Neumann's* case (1) was decided upon peculiar facts, and is therefore inapplicable ; that the actual amount of dividend which a shareholder receives out of profits and gains which have borne tax under sched. D. must always be received after deduction of tax since dividends are not assessable in the hands of the shareholder ; and therefore it makes no difference whether a dividend is declared as £x without qualification or as £x free of tax, and the distinction between these present cases and *Neumann's* case (1) is that here the company's profits were taxed under sched. D. pound for pound, and the dividends in question did not exceed the residue of the profits after payment of tax, whereas in *Neumann's* case (1) the profits of the company had been taxed under sched. A., and tax had been deducted from dividends paid thereout on the basis of the annual value of the lands from which the income arose, leaving a sum which was placed to reserve in a specially segregated fund, and afterwards distributed *in toto*, so that the dividends therefrom were not in fact, nor could they be, described as tax free.

It was contended, on the other hand, by Mr. Borneman for the respondents, with much ability, that the case is governed by *Neumann's* case (1) ; that the *Ashton Gas Co.* case (2) was before the House of Lords in that case ; that the *Ashton Gas Co.* case (2) was distinguishable, because it was decided upon the Income Tax Act, 1842, s. 54, and not upon All Schedules Rules, r. 20 ; that it was only an authority as to what are profits ; that the decision in *Neumann's* case (1) was that where no deduction for tax is made by a company, the Finance Act, 1931, s. 7 (2), has no application ; that a company when it declares a dividend creates a dividend fund which cannot be exceeded any more than could the specially segregated fund dealt with in *Neumann's* case (1) ; that the Crown's contention would involve that this fund should be exceeded and that cases such as *North British Railway Co. v. Scott* (5), and *Hartland v. Diggines* (6), have no bearing, being decided on sched. E.

I am of opinion that the contention of the Crown is correct. The reasoning of the *Ashton Gas Co.* case (2) appears to me directly applicable to the present case. The company there declared and paid dividend at the maximum rate allowed by the company's special Act, and certified that income tax had been or would be paid, and the courts held that the member of the company received a sum larger by the amount of the income tax than the maximum. In the present case, in Pratt's case,

the same certificate was given, and in both cases in fact income tax was paid under sched. D. pound for pound out of the profits of the company. In my opinion, the difference between rule 20 and sect. 54 of the Act of 1842 is not material, but the decision in the House of Lords in *Neumann's* case (1) requires careful consideration. The basis of that decision is, in my opinion, that their Lordships there considered that the taxable profits of the company having been taxed under sched. A., and dividends declared thereout less tax, the remainder of the actual profits which was specially segregated in a reserve fund could not be exceeded even for the purpose of the shareholders' sur-tax when it came to be divided, because it was all that remained, the rest of the profits having been comprehensively dealt with before. When LORD TOMLIN said at p. 364 in *Neumann's* case (1):

If a deduction from the gross sum was authorised but was not in fact made, as was the case here, there is, in my opinion, nothing in the language of the subsection which entitles the inland revenue to treat the gross sum as being greater than in fact it was. From the income tax point of view, it makes no difference to the revenue whether the deduction is made or not, because the company does not have to account for what it deducts.

and when LORD WRIGHT said at p. 373 :

Such a case as the present is unusual, because a fund has been segregated and divided *in toto* ; hence, if the company had deducted tax, it would have been from a gross amount, not of £5,343 15s. 0d., but of £4,275, and equally, if the dividend had been " tax free," it would have been a dividend of the net amount after the appropriate deduction of tax had been made from the sum of £4,275

they were dealing with the case on the footing that there had in fact been no deduction of income tax, that is to say, that the tax paid under sched. A. had for that purpose no connection with the specially segregated fund, but in the present case the facts are quite different. The companies here, in paying income tax under sched. D. out of their profits pound for pound, and subsequently declaring dividends which absorbed only the remainder or part of the remainder of their profits, were in effect deducting income tax, or as BUCKLEY, J., said in the *Ashton* case (2), relieving the shareholder from liability. The Finance Act, 1931, s. 7 (2) then applies in terms. It may well be that if the company had distributed, not merely the remainder of their profits left over after payment of income tax, but a sum equal to the whole of their profits, the Finance Act, 1931, s. 7 (2), would have had no application, because as the House of Lords held in *Neumann's* case (1), to have added income tax to the total amount of the company's profits would have created a fictitious figure which never existed, and exceeded the fund available, nor could the dividend so declared be described as " tax free." A point was raised in Pratt's case that as the dividend paid absorbed practically the whole of the balance of profit available for distribution, sect. 7 (2) could

not be applicable ; but in my opinion there is no force in this contention, since the dividend paid only absorbed practically the whole balance after payment of income tax. For these reasons I hold that the appeals must be allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Linklaters & Paines* (for the respondent, Pearson) ; *Romer, Skan & Brashier* (for the respondent, Pratt).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

LOWRY (INSPECTOR OF TAXES) v. FIELD.

LOWRY (INSPECTOR OF TAXES) v. WILLIAMS.

TITCOMB v. CLANCY (INSPECTOR OF TAXES).

DE BURGH WHYTE v. CLANCY (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), May 22, 1936.]

Income Tax—Profits—Capital profit—Subscription to mining venture—Allotment of shares in development company.

A company amongst its other activities prospected for, acquired options over, purchased and resold to development companies mineral properties in various parts of the world. Certain persons who were not shareholders in the company were invited to participate in these ventures, the company and the participants each subscribing a certain sum of money, and the money being used for the expenses of prospecting the particular property concerned and acquiring an option over it. If the prospecting was satisfactory the option was exercised and a development company formed, in which the company and the participants were allotted shares. The participants did not in fact sell these shares. Certain participants were assessed upon the difference between the amount of their subscription to the venture and the nominal value of the shares allotted to them :—

HELD : the profit on the subscription to the venture was a profit of a capital nature and was not liable to tax. Where there is an investment of money there must be a possibility of the profit upon that money recurring for it to be a revenue profit.

[EDITORIAL NOTE.] The present case is to some extent particular in its facts. Shortly the facts were that persons, who had subscribed to the preliminary expenses of a venture, were given shares in a company subsequently formed to carry on the venture when it had assumed a definite shape. They did not in any way realise these shares and the transaction seems therefore to be properly construed as one in which capital money put into a business was later transformed into shares in a company running the business. It seems merely to be an alteration in form of the capital and, if the nominal value of the shares was greater than the original sum subscribed, that was an increase in capital value and not a trading profit.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 98-100, paras. 192, 193, and FOR CASES, see DIGEST, Vol. 28, pp. 22, 23, Nos. 113-122.]

Cases referred to :—

(1) *Ryall v. Hoare, Ryall v. Honeywill*, [1922] 2 K.B. 447 ; 8 Tax Cas. 521 ; 28 Digest 81, 453.

- (2) *Martin v. Lowry, Martin v. Inland Revenue Comrs.*, [1927] A.C. 312; 11 Tax Cas. 297; 28 Digest 22, 114.
- (3) *Cooper v. Stubbs*, [1925] 2 K.B. 753; 10 Tax Cas. 29; 28 Digest 22, 113.
- (4) *Pearn v. Miller* (1927), 11 Tax Cas. 610; Digest Supp.
- (5) *Jones v. Leeming*, [1930] A.C. 415; 15 Tax Cas. 333; Digest Supp.
- (6) *Californian Copper Syndicate, Ltd. v. Harris* (1905), 5 Tax Cas. 159; 28 Digest 23, Case (b).

CASES STATED by the Commissioners for the Special Purposes of Income Tax under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice.

The facts fully appear from the judgment.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the Crown.

Raymond Needham, K.C., and Terence Donovan, for the appellants, Titcomb and de Burgh Whyte, and for respondents, Field and Williams.

LAWRENCE, J.: These are four cases, in two of which the commissioners have decided in favour of the Crown and in two of which they have decided against the Crown. The point that is raised is whether the taxpayers are taxable in respect of profits which they have made or are alleged to have made in ventures into which they have entered with a company called the Selection Trust, Ltd. That is a company of which a Mr. Chester Beatty is chairman, and among its activities is prospecting for and acquiring options over and purchasing and reselling to development companies mineral properties in various parts of the world. There is no doubt that the Selection Trust, Ltd., carries on a trade in respect of those ventures and is taxable on the balance of its profits and gains in connection therewith. It appears that Mr. Chester Beatty has devised a scheme to allow certain persons who are not shareholders in Selection Trust to participate in these ventures, and the method adopted is to invite these persons, among whom are the four taxpayers concerned in these cases, to subscribe towards a venture. The Selection Trust and the participants subscribe so much money each, and the money is used for the purpose of the expenses of prospecting the particular property concerned and acquiring an option over it, and if the prospecting is satisfactory the option is then exercised, and a development company is formed, and the adventurers, namely, the Selection Trust and the other participants, are allotted shares in the development company. There are details of the scheme under which the participants who put up the money which is at first called up for the venture are denominated group 1. They need go no further in the venture. If more money is required an invitation to subscribe to that money is made to them. If they do not choose to subscribe any more, then they do not do so, and the persons who do subscribe money become

group 2, and so on. Their respective interests appear to be determined in the ultimate subject-matter of the venture, and the shares which are to be allotted to the participants appear to be determined by the Selection Trust, who manage the venture. The only share in the management taken by the participants is that there is a provision that it is necessary to have the concurrence of a majority for the purpose of increasing the initial commitment. The Selection Trust need not develop the property by means of a development company; it can turn the property to account in any way that it thinks necessary or right, and the participants, therefore, might receive money in return for their subscription or they might receive shares. In the cases which are before me they have received shares, and they have been assessed upon the difference between the amount of their subscription and the nominal value of the shares which have been allotted to them in the development company. It appears that they have been assessed in that way upon the nominal value of the shares because some of the shares were not dealt in on the market, and it was assumed that the nominal value was a fair measure of the real value of the shares. It is not that the participants have actually sold their shares and so realised a profit; I think that in none of the cases have they done so; certainly in some they have not. It is not contended that the participants, the taxpayers, are carrying on a trade in these matters, and the question is whether this profit which they are said to have realised is a revenue profit or whether it is a capital profit.

Before I consider the arguments and the cases to which my attention has been called, I think it appropriate to draw attention to the evidence to which my attention was called by Mr. Needham, which was accepted by the commissioners. The first is in the *Titcomb* case, where the case says that the appellant gave evidence, and the evidence, which the commissioners accepted, was that:

he had known Mr. Beatty from the time when they were students together . . . that he had accepted nearly all the offers to participate in ventures made to him by Selection Trust; that he had in some cases sold part of his right to participate before taking up the shares of the development company; that he had bought shares in the development companies in some cases, and that all his investments were in mines and mining shares. He contributed towards the cost of the ventures in the hope of receiving ultimately dividends from the working of the mines. He had never borrowed any money for the purpose of making such contributions, and he still held the shares he had received.

Then in the case of *Field*, evidence was given:

that his object in contributing towards the cost of the various ventures was to acquire and hold shares in any company which might eventually be formed to exploit the property, which shares he hoped would yield him dividends. At no time did he take any part in the management of the ventures or any of them. Although he had occasionally been obliged to sell some of the original shares allotted to him he

still held considerably more shares at the present time than the total originally allotted. He could have waited till a development company was formed and purchased shares in it in the ordinary way, but then he would have had to pay a higher price for such shares.

In the Williams case the taxpayer's

object in contributing towards the cost of the various ventures was to acquire and hold shares in any company which might eventually be formed to exploit the property, which shares he hoped would yield him dividends. At no time did he take any part in the management of the ventures or any of them. As he was getting old he had realised some of his holdings and reinvested them in gilt-edged securities, but he throughout believed in the ventures. He could have waited till a development company was formed and purchased shares in it in the ordinary way.

Then in the de Burgh Whyte case, in which the taxpayer had only taken part in two ventures, the evidence was that :

he did not accept all the offers to participate in ventures made to him by Selection Trust, and that nearly all his investments were in mines and mining shares. He looked upon his contributions to the cost of the ventures as an investment in a mining property, which would ultimately allow him to participate in the fortunes of any company formed to operate the property. He expected to get shares for the money he put up, and he regarded contribution towards the cost of a venture as the cheapest method of acquiring the mining shares he wanted. It was better than waiting until the shares were quoted at an enhanced price on the Stock Exchange.

So that in so far as the intentions of the various taxpayers are concerned it seems to me that their intention at the time that they subscribed the money was the intention of investment. Now the Attorney-General has argued, and Mr. Hills has also argued, that the subscriptions and the net profit which has arisen upon them or which is alleged to have arisen upon them is income, because it must be looked at as being the reward for the use of their money, and therefore I think the underlying basis of the argument was that it was in the nature either of interest analogous to case III or was analogous to dividend, which would be, I think, under case I, or that it was in the nature of remuneration for services, which were performed not by the actual subscriber himself but by his agents, the Selection Trust. The Attorney-General said that the participant risked his money to take part in the Selection Trust, Limited's trade of prospecting. He referred me to the case of *Ryall v. Hoare* (1), which was the case of commission to a director for guaranteeing the bank overdraft of his company. He also referred me to the case of *Martin v. Lowry* (2), which was the case of the disposal of a large quantity of linen ; and *Cooper v. Stubbs* (3), which is the case upon which the Crown most rely, a case in which a taxpayer was held taxable, although he had not in point of fact engaged in trade, in respect of a number of dealings in cotton futures. He also referred me to the case of *Pearn v. Miller* (4), and to *Jones v. Leeming* (5), upon which Mr. Needham on

behalf of the taxpayer relies. The Attorney-General also submitted that these participants are like shareholders or like sleeping partners, and that therefore their interest in the ventures is to be regarded as analogous to the interest of the Selection Trust itself, and that they are really taking part in an indirect method in the trade of the Selection Trust. He also said that the fact that these properties were not being merely bought and re-sold, but were being prospected and an option taken and the option exercised at the same moment of time as the development company came into existence and acquired the property proved that it was not a case of the sale and re-sale of property by the Selection Trust and the participants, and that those facts make the profit which is derived profit of revenue character. That argument, coupled with the argument that the profit was in the nature of interest or *ejusdem generis* with interest for the use of money, were the two substantial arguments which I understood him to advance as saying that this falls under case VI and is therefore taxable, although no trade is carried on under case I.

Mr. Needham, on the other hand, contended that this could not be treated as being *ejusdem generis* with interest. He pointed out that the commissioners in the cases where they decided against the taxpayer had described the participations as deposits and loans, at any rate as deposits. He pointed out that they are not in fact loans, because there is no obligation on the part of the trust to repay the money; and he submitted that the true view was that the participants were really co-owners with the trust. He said that the case was really very close in its facts to and governed in principle by the case of *Jones v. Leeming* (5), and that the cotton future case was clearly distinguishable. I think it would be useful if I were to refer to the passages which he relied upon in the cases which were cited. He relied upon the passage in the judgment of ROWLATT, J., in *Ryall v. Hoare* (1), which was the case of the commission payable upon guarantee. ROWLATT, J., said, at p. 525:

In the first place, it is quite clear that anything in the nature of a capital accretion is outside the words "profits or gains," as used in these Acts; that, of course, follows from the scope of the Act, and it is sanctified by the usage now of a century. That rules out, of course, the well-known case of a casual profit made upon an isolated buying and selling of some article; that is a capital accretion, and unless it is merged with other similar transactions in the carrying on of a trade, and the trade is taxed, no tax is exigible in respect of a transaction of that kind. "Profits or gains" mean something which is in the nature of interest or fruit, as opposed to principal or tree.

In my opinion, that passage is directly applicable to this case, and in my opinion the subscription by these participants was of the nature of principal or tree, and the profit which they are said to have derived in the first instance is the principal or capital profit. The revenue profit

which they derived is the revenue which they derived by dividends upon the shares in the company. Then Mr. Needham referred to the case of *Pearn v. Miller* (4), which was the case of the builders' foreman who had bought seven properties and resold four of them at a profit, and it was held that he was not taxable on that profit under case VI. There ROWLATT, J., said, at p. 613 :

Now, I wish to say very clearly, in order that I may be corrected if I am wrong, that I think it is very often the case that you may say of something that it may be under case F or case VI. That may very often be true, but it is wholly illusive to say anything of that kind where you are dealing with a difference between the purchase and sale price of goods. If it is desired to tax the difference between what a man has bought goods for, or property for, and sold them for, you can only tax it, in my judgment, if you can say that what he did was a trade or adventure or concern in the nature of trade. I think you cannot get under case VI a tax out of appreciation of property ; you have to get it under case I. I wish to say that as clearly as I possibly can say it, because it makes all the difference in the world, for this reason : If you go under case I, you have to have a proper stocktaking account, and you have to bring in what property is left, and bring in the property which he has sold at a loss, and you have to have a proper account as of a trade, adventure or concern in the nature of a trade.

That, again, I think, is directly applicable to this case, and in my judgment these ventures were in their nature adventures in the purchase and resale of properties, and it is not justifiable, in the absence of express provision to that effect, to tax the profits or alleged profits upon such adventures without bringing in the losses. In the present cases the profits are not really realised, because the shares have not been sold. It is true that in certain cases, such as *Californian Copper Syndicate, Ltd. v. Harris* (6), shares have been held to represent money for the purpose of arriving at a profit derived, but I am at any rate very doubtful whether those cases are applicable to such cases as the present, where the evidence is that the persons who have subscribed money have done so with the intention of investment and therefore have in fact not realised at the time of taxation any profit at all. Mr. Needham then referred to the case of *Jones v. Leeming* (5), which was the case of a taxpayer who was a member of a syndicate of four persons which was formed to acquire an option over a rubber estate with a view to reselling it at a profit. The option was secured, and then the estate being considered too small an option was acquired over an adjoining estate, and then the two estates so acquired were sold and a profit in cash was obtained. The commissioners did not find that the trade was being carried on, but they confirmed the assessment, and ROWLATT, J., sent the case back to them for the purpose of finding whether there was a trade carried on. They found that there was not a trade or concern in the nature of trade carried on, and the case was then carried to the House of Lords, where it was ultimately decided, and it was held that there being no trade the profit

made was not taxable and that it made no difference that the object of the members of the syndicate was resale and profit on a resale. LORD BUCKMASTER pointed out with reference to the case of *Cooper v. Stubbs* (3), that in his view that case was miles apart from the case that he was then considering, and LORD DUNEDIN in commenting upon *Cooper v. Stubbs* (3) pointed out that the whole essence of *Cooper v. Stubbs* (3) was the recurrence of the transactions. Transactions had been going on for eight years running. The case of *Cooper v. Stubbs* (3), as I have said, was the case of dealing in cotton futures, and ATKIN, L.J., as he then was, himself points out, at p. 56, that the profits

arise from having made a real contract which gives you rights, and then taking advantage of that contract, selling the commodity, or the right which you have acquired by contract to have delivery of that commodity, either to the person who has made the contract or to somebody else ; it does not matter ; you make a gain. There is no doubt that speculations in commodities of this kind are just like speculations in shares. They may under some circumstances be such that you could not reasonably call the profit made an actual profit or gain. It may very well be that transactions may be so carried out as to be nothing but in the nature of temporary investments repeated several times over, and something in the nature of capital accretions which could not be brought within the title or meaning of "annual profit or gain," which to my mind must mean something which is of the nature of revenue or income, although I also think it is plain that it need not be repeated every year so as to be a continuous source of income. It may come in only as income or revenue in the one year, but still it has to be in the nature of an annual profit or gain. In this case you have to look at the facts and when you look at the facts you find that this gentleman has been making these profits or gains, not by investing his capital, because he never invested any money in the matter, but by making executory contracts which he closed by other executory contracts. He invested no money as such in the matter at all.

That seems to me to afford a true distinction between that case and the present cases, that ATKIN, L.J., found an element of revenue in the profit which he was there considering largely from the fact that there was no investment of capital. In my judgment, in the present cases, there being no question that no trade was carried on, I am of opinion that this is not analogous to a loan and that the profit cannot be regarded as *ejusdem generis* with interest on money, nor can it be regarded as a revenue profit, on account of the fact that the Selection Trust, which was a participant in the venture, was taxable in respect of its trade in this and similar ventures. I think the venture was from the point of view of the individual participants an investment of their money at as low a price as they possibly could obtain as a means of investing in these properties through the medium of the participation, and through the medium of the development companies in most cases of investing their money in the mining properties concerned, and I am inclined to think that wherever there is an investment of money there must be a possibility of the profit upon that money recurring for it to be a revenue profit,

and where, as here, the particular profit which it is sought to tax is not a profit which can recur, it is in such a case a profit of a capital nature. In my view that reasoning harmonises with the cases which have held that recurring profits where there is no investment of money may be of a revenue nature, the conception being that the capital there involved is nothing more than the individual's efforts, and the individual's efforts always being capable of recurring, the profit which is so derived from the individual source is treated as being a casual profit which may fall under case VI. It seems to me to agree with the principle of the decision in *Cooper v. Stubbs* (3) and with the observation of ATKIN, L.J., that there was no investment of capital at all. For these reasons I am of opinion that in the two cases in which the Crown is appellant the appeals will be dismissed with costs, and in the two cases in which the Crown is respondent, the appeals will be allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Birkbeck, Julius, Edwards & Co.* (for the appellants, Titcomb and de Burgh Whyte and the respondents, Field and Williams).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

GREYHOUND RACING ASSOCIATION (LIVERPOOL), LTD v. COOPER (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), May 28, 1936.]

Income Tax—Trading profit—Lump sum—Surrender of lease.

The appellant company having acquired a racing track and equipped it for greyhound racing, fell into financial difficulties, and the debenture holders appointed a receiver. The latter hired the track to another company, at first for yearly periods, and then for the period from May 1, 1932, to Apr. 29, 1941. In Mar., 1934, the second company desiring to go into voluntary liquidation, it became necessary to ascertain its liabilities, and the receiver was approached to fix a sum for which he would accept a full surrender of the hiring agreement. It was eventually agreed that a full surrender would be accepted on a payment of £15,640. That payment was included in the revenue account of the appellant company:—

Held: the payment was a payment in respect of future rents and was to be treated as income and not as capital. The agreement for hiring the track was not an agreement which related to the whole structure of the appellant company's business, and did not prevent it from acquiring other capital assets or from carrying on its business in connection with such assets in any manner it pleased.

[EDITORIAL NOTE.] The point made in this case in the determination whether this payment was capital or income is that this payment was not related to the whole structure of the company's business, but was merely a lump sum payment of future rents. The case may be compared with *Desoutter Bros., Ltd. v. Hanger & Co., Ltd.*, [1936] 1 All E.R. 535, where an opposite conclusion was reached, because there were no agreed future payments to be replaced by a fixed sum.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 126-128, paras. 237-240; and FOR THE CASES, see DIGEST, Vol. 28, pp. 47-49, Ncs. 242-252.]

Cases referred to :

- (1) *Van den Berghs, Ltd. v. Clark*, [1935] A.C. 431; 19 Tax Cas. 390; Digest Supp.
- (2) *Mallett v. Staveley Coal & Iron Co., Ltd.*, [1928] 2 K.B. 405; 13 Tax Cas. 772; Digest Supp.
- (3) *Short Bros., Ltd. v. Inland Revenue Comrs.* (1927), 136 L.T. 689; 12 Tax Cas. 955.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

A. M. Latter, K.C. and *H. P. Glover, K.C.*, for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

LAWRENCE, J. : The question in this case is whether the sum of £15,640 which was received by the appellant company in Mar., 1934, was a revenue receipt. The appellant company was formed in the year 1927, to carry on the business of greyhound racing, and on July 9, 1927, acquired the lease of the Stanley Racing Track for fourteen years. The company expended the sum of £40,356 on equipment, and made such losses in running the track that, on June 26, 1928, a receiver was appointed for the debenture holders. The receiver, on behalf of the company, hired the track to Electric Hare Greyhound Racing Company, Limited, from Aug. 8, 1928, to Oct. 31, 1929, and subsequently, on Mar. 11, 1932, a fresh agreement was arrived at under which the company granted a licence to the Electric Hare Company from May 1, 1932, to Apr. 29, 1941, receiving 15 per cent. of the gross takings, with certain minimum weekly sums. These receipts were brought in by the company as revenue receipts for income tax purposes. The company purchased the freehold of the track on Jan. 9, 1933. In Mar., 1934, the Electric Hare Greyhound Racing Company went into liquidation. As that company wanted a voluntary liquidation it was necessary to ascertain their debts and liabilities, and the Electric Hare Greyhound Racing Company, Limited, accordingly asked the receiver of the company whether he would accept a surrender of the said hiring agreement of Mar. 11, 1932, but he declined to accept a surrender having regard to the decision in the courts as to the legality of totalisators. The receiver eventually agreed, however, to a complete surrender if a new company to be formed would take over the premises at a rent to be agreed, and provided a sum was paid equal to the difference between the old and the new rents worked out on an actuarial basis at £15,640. The said sum of £15,640 was paid to the company on Mar. 29, 1934, and in the accounts of the company for the year ending Mar. 31, 1934, the said sum was in-

cluded as a receipt in the revenue account. The question as to what receipts are revenue and what are capital has given rise to much difference of opinion ; but it is clear in my opinion, that, if the sum in question is received for what is in truth the user of capital assets and not for their realisation, it is a revenue receipt, not capital. It is argued here that the licence of Mar. 11, 1932, was a capital asset of the appellant company, and that the sum paid for the surrender of that licence was a part realisation of that capital asset. In support of this argument the cases of *Van den Berghs v. Clark* (1) and *Mallett v. Staveley Coal & Iron Co., Ltd.* (2) were relied upon. In my opinion these cases are distinguishable from the present. In the latter the mineral leases were held to be capital assets and the sums paid for their surrender were held to be payments made in connection with and to get rid once and for all of onerous assets. But here in my opinion, the only capital asset in fact acquired by the appellant company was the track and its equipment. The user of that track, whether by the appellant company or its licensee, did not create new capital assets, nor did it realise the original capital asset, which remains the property of the appellant company, for which it has received, in the year 1934, the sum of £15,640 and is to receive the new rents provided for by the agreement of Mar., 1934. The sum of £15,640 was nothing more than a lump sum payment in place of future rents similar to the payments in question in *Short Brothers, Ltd. v. Inland Revenue Comrs.* (3), and similar cases. It was also argued that the case was analogous to *Van den Berghs'* case (1), and that the appellant company, in licensing the Electric Hare Company on the terms of receiving a share of the gross takings, was in a similar position to *Van den Berghs, Ltd.*, when they entered into the pooling agreement with the Dutch company in question in that case, and that therefore the sum paid for the cancellation of the licence was capital. But in my opinion the licence here in question was not an agreement which related to the whole structure of the appellant company's business, nor was it a fundamental organisation of their activities, as the pooling agreement was held to be in *Van den Berghs'* case (1). The payment of a percentage on gross receipts here was simply a means of arriving at the rent to be paid for the use of what, it is true, was in fact the company's only capital asset, but it did not prevent the company from acquiring other capital assets or from carrying on its business in connection with such assets in any way it pleased. For these reasons I am of opinion that the decision of the commissioners was right, and the appeal will be dismissed with costs.

Solicitors : *B'undell, Baker & Co.*, for *Snowball, Kyffin Taylor & Pruddah*, Liverpool (for the appellants) ; *Solicitor of Inland Revenue* (for the respondent).

WARMINGTONS v. McMURRAY.

[KING'S BENCH DIVISION (Goddard, J.), Mar. 9, 13, 1936.]

Solicitors—Retainer—Retainer to prosecute a succession of matters—Entire contract—Termination—Costs.

The defendant had embarked upon a variety of investments and transactions which were likely to result in serious losses. She retained the plaintiffs generally to prosecute all such actions and proceedings as might be necessary to get her out of her difficulties. Having successfully prosecuted several matters the plaintiffs delivered a bill of costs. The defendant, while offering to meet all disbursements in arbitration proceedings which were then being prosecuted on her behalf, intimated that she could not pay anything further. The plaintiffs then discharged themselves from their retainer and delivered a second bill and brought this action upon both bills:—

HELD: this was not a case of a solicitor retained to prosecute an action and no question of entire contract arose. The retainer here was one to prosecute a variety of matters and in such a case it was not reasonable that a solicitor should engage himself for an indefinite time without payment. In this case the solicitor could upon reasonable notice cease to act and sue for his costs.

[EDITORIAL NOTE.] Even when a retainer is entire the fact that the solicitor ceases to act for the client before the final conclusion of the matter in which he was retained does not necessarily preclude him from recovering his costs for work done. He can recover, where he discharges himself, if his client refuses to supply the requisite funds for the prosecution of the action or if the client conducts himself improperly. Here, however, the decision is upon another ground, in that it is held that the retainer was a general one to get the client generally out of her difficulties. In such a case there is no question of the solicitor being bound to prosecute the matter to a conclusion before being able to recover his costs. He may upon reasonable notice decline to proceed further with the matter unless his costs are paid; in other words, he may discharge himself from his retainer and sue for all his costs.

AS TO TERMINATION OF RETAINER, see HALSBURY, 1st Edn., Vol. 26, Solicitors, pp. 737-739, paras. 1218-1220; and FOR CASES, see DIGEST, Vol. 42, pp. 53-55, Nos. 440-463.]

Cases referred to:—

- (1) *Underwood, Son & Piper v. Lewis*, [1894] 2 Q.B. 306; 42 Digest 51, 415.
- (2) *Re Hall & Barker* (1878), 9 Ch.D. 538; 42 Digest 51, 414.

ACTION by solicitors upon two bills of costs to recover two sums of £617 11s. 3d. and £814 7s. 1d. The defence alleged that: (a) as to some of the matters the plaintiffs were not retained by the defendant but by certain companies; and (b) the plaintiffs, having discharged themselves in the course of an arbitration after an offer to provide the disbursements, could not maintain an action for the costs of such arbitration, the retainer to prosecute those proceedings being an entire contract. The facts are fully stated in the judgment.

Blanco White, K.C., and *Theodore Turner* for the plaintiffs.

Arnold Hopper for the defendant.

GODDARD, J. : In July, 1933, the defendant, who was a widow, then of considerable means, consulted Mr. Lloyd, a partner in the plaintiff firm, who are solicitors in the City. Her affairs had become involved and she had, to use a common expression, fallen among thieves. A man named Cohn, apparently with the assistance of another man, had caused her to embark upon a variety of transactions which were likely to cause her, and indeed had already caused her, serious losses. Among other things, they had induced her to find the money for a company called McMurray and Partners, Ltd., in which they had taken the precaution to provide that she should have no effective voting power. She had become interested in other companies and had advanced money on mortgages which were never completed, and altogether seems to have been in a fair way to lose what she had. Various claims were also being made against her by different classes of creditors, and, while it is unnecessary to set out in detail the variety of matters which her solicitors had to investigate and which are all detailed in the bills, the subject of this action, there is no doubt that the investigation which they had to undertake was long and complicated. Steps had to be taken in some instances in the name of, or ostensibly on behalf of, the companies in which her money was sunk, but whatever was done by Mr. Lloyd was always done on the defendant's behalf and for the protection primarily of her interests. An action in the Chancery Division was started against Cohn, in which fraud was alleged against him, and judgment was obtained on an interlocutory application for £1,500, with 7 per cent. interest. The rest of the action was left to proceed to trial in respect of other causes of action, Mrs. McMurray having been advised by counsel of standing that she had good prospects of success. That such advice was probably perfectly sound was shown by the sequel.

In July, 1934, Cohn, against whom bankruptcy proceedings had been instituted by the plaintiffs, following the judgment to which I have just referred, managed to arrange an interview with the defendant and her brother-in-law, who, I was told, was an English accountant practising in America, and I suppose on holiday in this country. This interview was without the knowledge of her solicitors. It appears that Cohn persuaded Mrs. McMurray, apparently with her brother-in-law's approval, to sign an agreement putting an end to the litigation and to the bankruptcy proceedings and to refer certain matters to arbitration in which the parties were to bear their own costs and also their own costs in the previous proceedings. It would be difficult to imagine a more unfavourable agreement for Mrs. McMurray to have made, and it speaks well, I think, for the plaintiffs that they did not immediately retire from representing her after the action she had taken behind their backs. However, they did not, but set to work to do the best they could for her in the arbitration. Incidentally, besides the £1,500 and interest, they

had also managed to recover other substantial sums for her. In Mar., 1935, after twenty months' work, they delivered a first bill of costs and a cash account showing a balance in their favour of £617 11s. 3d.

The arbitrators met in Apr., 1935. In view of the changed position brought about by the agreement, the arbitrators ordered new points of claim and defence to be delivered. The brief, and indeed the whole proceedings, had to be re-cast and much of the work already done in working up the action against Cohn was entirely thrown away. From time to time the plaintiffs pressed for payment of their bill. Their letters brought promises from time to time, but no cash. There was no absolute refusal to pay, but pleas for delay. The defendant realised some of her securities, but then found that a claim was being made on her by the liquidator of one of the companies in which she was involved and, being unwilling to sell out further securities which would then have been sold at a loss, and having apparently placed some portion of her fortune in trust for her children, she decided to retain the proceeds of what she had sold to meet the possible claim of the liquidator rather than pay the plaintiffs. From time to time she made suggestions that the arbitrators might be induced to make Cohn pay some of the costs, not realising, apparently, that by her own agreement she had effectively debarred him from so doing. In the end the plaintiffs refused to continue to act for her in the arbitration unless their first bill was paid. She had by this time taken other advice, though what reason she had for dissatisfaction with the plaintiffs as her advisers nowhere appears. Obviously acting under advice she offered to provide funds for all outstanding disbursements properly incurred in her action and in the arbitration, plus such counsel's fees as had yet to be paid, but intimated, as I read her letter, that she could pay the plaintiffs nothing on account of their charges unless and until she received funds from America, which, she said, she was expecting any day to receive. Whether her expectation has ever been fulfilled or whether she was or is in a position to pay any part of the plaintiff's charges beyond the disbursements, I do not know, as she did not give evidence. The plaintiffs refused to continue to act for her as she would not pay their first bill and discharged themselves from their retainer. They then delivered a second bill, amounting to £814 7s. 1d., of which £744 2s. 6d. was attributable to the arbitration proceedings, and the balance, £70 4s. 7d. to other matters. This action is brought to recover the amount of both bills.

The defence is twofold. First, it is said that as to many of the charges in the first bill and a few in the second they were incurred not in acting as solicitors for the defendant, but on behalf of some of the companies to which I have referred. There is nothing whatever in this defence. Though in some instances claims had to be made or actions taken in the names of the various companies in which the defendant's money was

sunk, the plaintiffs were throughout acting on the instructions and for the benefit of the defendant and she was their client in all these matters. Subject to taxation, there is no defence to the first bill. The second defence needs more consideration. It is said that, as the plaintiffs discharged themselves after the defendant had offered to provide the disbursements, they cannot maintain an action for any costs incurred by them in relation to the arbitration, and that, therefore, the claim, or at any rate so much of it as relates to the arbitration, must fail, and nearly all the second bill does relate to that matter.

The rights and obligations of a solicitor retained to conduct a common law action—and an arbitration would be no different—were settled once and for all, so far as this court is concerned, by *Underwood, Son & Piper v. Lewis* (1). It is there laid down that, if a solicitor undertakes to conduct an action he makes one entire contract, in the absence of any special agreement, to conduct the case to the end, and he cannot discharge himself so as to entitle himself to any costs except for good cause and on reasonable notice to the client. This is not a special rule applicable only to the relationship of solicitor and client, but is part of the ordinary law of contract. Where there is an entire consideration there must be entire performance to entitle the plaintiff to remuneration. As SIR GEORGE JESSEL, M.R., put it in *Re Hall & Barker* (2), to which I shall refer again, if a shoe-maker agrees to make a pair of shoes, he cannot deliver one to you and ask for half the price. If, however, a client does not perform his part of the bargain, that will discharge the solicitor and he may then sue on a *quantum meruit*. So it is now held that, if the client fails to put the solicitor in funds for counsel's fees and other disbursements, that is a good reason for the solicitor declining to proceed. He does not undertake to finance his client, and the latter impliedly promises to keep him in funds for disbursements. But the solicitor cannot as a condition of continuing to represent the client demand part of his profit costs as the case proceeds. I should hesitate long before I held that, if a solicitor accepts a retainer to continue an action, it would be good cause for him to decline to continue acting because his client refused or failed to pay him some costs incurred in some other matters, incurred independently of the action. Indeed, I am satisfied that this would not be a good cause. No doubt if the client declared himself insolvent or intimated that he would refuse to pay his solicitor his costs when the time came for payment, the solicitor would be entitled to discharge himself, because the client would be repudiating the contract. But I do not think that I should be justified in holding in this case that the defendant went so far as that. She did not pay, and was intimating that at present she could not, at any rate without great inconvenience, pay, but I do not find that she was refusing to pay in the sense that she was repudiating her bargain.

In my judgment, however, the plaintiffs' right to recover the amount of their second bill depends on different and rather wider considerations. This is not the simple case of a solicitor being retained simply to conduct an arbitration or action, and who happens to have been employed by the client on a previous occasion for which costs are still owing. The retainer of the solicitor came at a much earlier date than the beginning of the arbitration, and the employment was generally to get the client, the defendant, out of her difficulties. I have already indicated some of the multifarious activities and investigations which this involved. The arbitration was in truth only one part of the work which the solicitor was employed to do. To employ a solicitor to conduct an action is one thing; to employ him to get you generally out of your difficulties, which may involve several actions, originating summonses, bankruptcy proceedings, and taking all manner of proceedings extending perhaps over years, is another. I think it would be altogether wrong to apply the doctrine of entire contract to such a state of things as the present and to isolate this arbitration, so to speak, from everything else. I think that the reasoning of SIR GEORGE JESSEL, M.R., in *Re Hall & Barker* (2) exactly applies to this case. The distinction does not depend upon whether the action is in the nature of one at common law or an equitable suit for administration; that of itself would afford no ground of difference. The question is whether or not the employment is one to which the doctrine of entire contract applies. If as JESSEL, M.R., pointed out in *Re Hall & Barker* (2), at p. 545, there is a series of services which, though nominally in relation to one matter, is in reality in relation to a succession of matters, it is not within the doctrine because it is not within the mischief. It is not reasonable, he said, that a solicitor should engage to act on for an indefinite time without receiving payment on which he can maintain himself.

For these reasons I am of opinion that this is not a case of an entire contract and is not governed by the cases which have decided that in such a case a solicitor cannot discharge himself. I think that he can in this case cease to act for the client when he chooses—of course, on reasonable notice—and sue for the work which he has done. For these reasons I give judgment for the plaintiffs for both bills, subject, however, to taxation if the defendant so desires.

Solicitors: *Warmingtons* (for the plaintiffs); *Fosters* (for the defendant).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

Re ANDREWS, *Ex parte* THE OFFICIAL RECEIVER (TRUSTEE)
v. STANDARD RANGE AND FOUNDRY CO., LTD.

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Eve, J.), **June 19, 1936.**]

Bankruptcy—Case stated by county court judge—Decision of High Court—Appeal to Court of Appeal—Bankruptcy Act, 1914 (c. 59), s. 108 (2).

In a bankruptcy matter the county court judge stated a case for the opinion of the High Court on three questions. The case was argued before a judge in the Chancery Division, who held that the first question was concluded by previous decisions of that division, and the second and third questions did not therefore arise. The operative part of the order as drawn up dealt only with costs :—

HELD : this was a decision of the High Court and not of the county court within the Bankruptcy Act, 1914, s. 108 (2), and an appeal therefrom lay to the Court of Appeal.

[EDITORIAL NOTE.] The first point in this case is that there is here no appeal from the county court, the case stated under the Bankruptcy Act, 1914, s. 100, not being by way of appeal. The decision, therefore, in the Chancery Division is not a decision of that court on appeal from the county court which would be final and conclusive under sect. 108 (2), but a decision of the High Court, from which an appeal lies to the Court of Appeal. The second point is that although in the peculiar circumstances of this case—the matter being covered by previous decisions of a court of first instance—the order as drawn only referred to costs, this did not prevent it being a decision from which an appeal would lie to the Court of Appeal.

AS TO APPEALS IN BANKRUPTCY MATTERS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 398-400, paras. 541-543; and FOR THE CASES, see DIGEST, Vol. 4, pp. 524-529, Nos. 4791-4839.]

Cases referred to :

- (1) *Re Godwin, Ex p. Trustee v. Morris, Re Godwin, Ex p. Trustee v. British Reinforced Concrete Engineering Co.*, [1935] Ch. 213; Digest Supp.
- (2) *Re Samuels, Ex p. Trustee v. Tee*, [1935] Ch. 341; Digest Supp.
- (3) *Re Moon, Ex p. Dawes* (1886), 17 Q.B.D. 275; 4 Digest 525, 4794.

APPLICATION for leave to enter an appeal. The hearing in the Chancery Division before FARWELL, J., is reported in [1936] 2 All E.R. 420.

The Attorney-General (Sir Donald Somervell, K.C.) and C. N. Tindale Davis for the Official Receiver : The point is whether there is a right of appeal from a determination of a judge of the High Court on a case stated under the Bankruptcy Act, 1914, s. 100 (3). The power to appeal is stated in sect. 108 (2) :

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows :—

(a) where the order is made by a county court, an appeal shall lie to a divisional court of the High Court, of which the judge to whom bankruptcy business is for the time being assigned shall, for the purpose of hearing any such appeal, be a member. The decision of the divisional court upon any such appeal shall be final and conclusive.

unless in any case the divisional court or the Court of Appeal sees fit to give special leave to appeal therefrom to the Court of Appeal, whose decision in such case shall be final and conclusive ;

(b) where the order (not being an order on appeal from a county court) is made by the High Court, an appeal shall lie to the Court of Appeal, and an appeal shall, with the leave of the Court of Appeal, but not otherwise, lie from the order of that court to the House of Lords.

SLESSER, L.J. : This is an application made on behalf of the Official Receiver, acting as a trustee in the matter of a bankruptcy order, on the question whether he has a right of appeal from an answer made by the learned judge, under the Bankruptcy Act, 1914, s. 100 (3), on a matter referred to him for an answer on a special case on a question of law by a county court judge.

It is unnecessary now to discuss the matters which were stated by the county court judge to the High Court judge for his opinion. It is sufficient to say that they raise a substantial question of law under the Bankruptcy Act. The questions were brought before the learned judge and, on behalf of the trustee, it was said by Mr. Tindale Davis that so far as regards the first question asked, it had been determined by two cases, namely, *Re Godwin* (1) and *Re Samuels* (2). They are similar on all material matters to the present case. The learned judge—FARWELL, J.—as the order made by him shows, then came to the following conclusions :

The court being of opinion that the question of law had been already determined in the cases mentioned and the conclusions thereof, the court is bound to answer the first question in the affirmative. No answer need be made to the second and third questions. It is ordered that the respondent's costs be taxed by the taxing master of this court.

Under the Bankruptcy Act, 1914, s. 108 (2) (b), where an order is made by the High Court, not being an order on appeal from the county court, an appeal shall lie to the Court of Appeal, and by leave, and not otherwise, to the House of Lords.

Whether this is an appeal from the High Court or from the county court, the case of *Re Moon, Ex p. Dawes* (3) is decisive. There an objection having been taken to an appeal from a judge who had given an opinion on a special case under the Bankruptcy Act, 1883, s. 97 (3), which is, so far as is here material, in the same language, a preliminary objection was taken that this was not an order of the High Court which could be so appealed, and that objection was overruled. LORD ESHER, M.R., said at p. 285 :

This is not an appeal from an order of a county court. The first effective order or judgment was made or given by the High Court, and from that order an appeal lies to this court

and LINDLEY and LOPES, L.JJ., gave judgment to the same effect. Therefore the only question which can arise under this particular

matter now is whether this determination of FARWELL, J., is an order of the High Court in the circumstances of this case. The learned associate seems to have come to the conclusion that because the actual operative words "It is ordered" deal with the question of costs only, no order was in fact made. But we have come to the conclusion that that was a mistake. The court had clearly made an order. The learned judge said he was bound to answer the first question in the affirmative. The court has answered "Yes" to the first question and the fact that the court has not thought fit to give reasons for that decision, other than that the matter had been determined on similar facts in similar cases is beside the point. The point is that the court has answered question one in the affirmative and if any doubt could arise, I think it is made abundantly clear by the words which he used afterwards to Mr. Tindale Davis. I think he has made the order as to costs in the usual way. The order which I make will be that the appeal may be duly entered and determined by this court under the section of the Bankruptcy Act to which I have referred.

ROMER, L.J. : I agree.

EVE, J. : I agree.

Solicitor : *Solicitor to the Board of Trade* (for the Official Receiver).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

RAMSAY v. GRAMOPHONE CO., LTD.

[COURT OF APPEAL (Slessor, Greene and Scott, L.JJ.), **Mar. 23, 24, April 7, 1936.**]

Master and Servant—Workmen's compensation—Review of weekly payments—Change of circumstances—Workmen's Compensation Act, 1925 (c. 42), s. 11.

A workman was injured in Mar., 1933, and underwent an operation for the removal of cartilage from his knee. He was paid compensation as for total incapacity until Nov., 1933, when he returned to light work and was paid compensation as for partial incapacity. In Mar., 1934, payments were stopped, and the workman applied for an arbitration. At the hearing in Jan., 1935, the workman's doctor said that the workman was not fit for his old work, the employers' doctor saying that he was fit for such work. The latter in his evidence referred to the probability that there was "some loose body which occasionally gets nipped between the bones of the joint," but he said there was no X-ray evidence of such loose body. The county court judge awarded compensation as for partial incapacity up to the date of the hearing and granted a declaration of liability. The workman applied to his foreman for his old work, but this was refused in the absence of a certificate of fitness from the workman's doctor. The doctor refused such a certificate and the workman continued at light work. In June, 1935, trouble developed, due to the nipping of a piece of cartilage which had not been removed. In Aug., 1935, the workman applied for a review.

The county court judge came to the conclusion that the workman was more disabled than he had thought in Jan., 1935, "due to change of circumstances," and made an award for compensation on the basis of partial incapacity. The employers appealed:—

HELD: the finding that there was a change of circumstances was founded upon additional positive evidence of fact not before him at the first hearing and the matter was not *res judicata*.

Per SCOTT, L.J.: the evidence given at the first hearing is not admissible on the second hearing as if it had been taken on commission. If it is necessary to prove the facts at the time of the first hearing the witnesses must be called and examined *de novo*.

[EDITORIAL NOTE.] If the circumstances are the same as were existing at the time of the award, no review is possible; but the physical condition of the workman and his capacity or incapacity for work at different periods can never be *res judicata*. The position here is that what was merely suspected at the first hearing, had at the time of the second hearing become an established fact.

AS TO REVIEW OF COMPENSATION, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 230-232, paras. 541-547; and FOR CASES, see DIGEST, Vol. 34, pp. 452, 453, Nos. 3711-3720.]

Cases referred to:

- (1) *Crossfield & Sons, Ltd. v. Tanian*, [1900] 2 Q.B. 629; 34 Digest 453, 3721.
- (2) *Sharman v. Holliday & Greenwood, Ltd.*, [1904] 1 K.B. 235; 34 Digest 452, 3711.
- (3) *Mead v. Lockhart, Ltd.* (1909), 2 B.W.C.C. 398; 34 Digest 453, 3712.
- (4) *Dundee, Perth & London Shipping Co. v. Willcock* (1916), 9 B.W.C.C. 471; 34 Digest 453, 3716.
- (5) *Radcliffe v. Pacific Steam Navigation Co.*, [1910] 1 K.B. 685; 34 Digest 455, 3733.
- (6) *Plumb v. Cobden Flour Mills Co.*, [1914] A.C. 62; 34 Digest 288, 2415.
- (7) *India Rubber, Gutta Percha & Telegraph Works Co., Ltd. v. Chapman* (1926), 20 B.W.C.C. 184; Digest Supp.

APPEAL from an award of His Honour JUDGE DUMAS made at Uxbridge County Court on Nov. 22, 1935. The facts are set out in the judgment of SLESSER, L.J.

Edgar Dale and J. H. C. Goldie for the appellants.

E. W. Cave, K.C., and *George Bankes* for the respondent.

SLESSER, L.J.: This is an appeal from a decision given by the county court judge on a review under sect. 11 of the 1925 Act, at the request of the workman. The material facts are as follows. In Mar., 1933, the workman met with an accident while working for the employers. He was lying under an iron bench fitting some pipes when a stanchion gave way and he twisted his right leg, and struck the inner side of the knee against a bench. He had to leave work, and, on the advice of his doctor, went to bed and subsequently was admitted to the hospital on May 5. He had an operation on the right knee and was discharged on May 20. Until Nov., 1933, he was paid compensation on the basis of total incapacity and, thereafter, was paid on the basis of partial

incapacity until Mar. 17, 1934. On that date, compensation was stopped and thereupon the workman applied for arbitration. On that arbitration the employers by their answer stated they were willing to submit to a declaration of liability. After hearing evidence of doctors on both sides and others, the learned judge according to the note of his reasons came to the conclusion that the workman was entitled to compensation of 12s. 9d. a week up to Jan. 29, 1935—the date of the hearing—and thereafter was entitled only to a declaration of liability. By this declaration of liability and refusal of compensation I take it that the learned judge then came to the conclusion that the workman was no longer incapacitated for work, but that he had established that there was a reasonable probability that incapacity might ensue. In Nov., 1933, following on the operation for removal of cartilage in May, above-mentioned, the workman had gone back to work with his employers earning £2 8s. 0d. plus 9s. overtime in place of the pre-accident earnings of £4 2s. 6d.

On Aug. 13, 1935, the workman applied for the review which is the subject of the present appeal. In his application he alleged that he had returned to work at the employers' works and had found that he was unable to do his pre-accident work and, consequently, was earning 17s. 8d. less than his pre-accident wages, and that the medical opinion, given at the hearing of the arbitration, on Jan. 29, 1935, on behalf of the employers, that the workman was fit to do his pre-accident work had since been falsified. On the hearing of this review, on Nov. 22, 1935, the learned judge came to this conclusion and said :

I have come to the conclusion this workman was really more disabled than I thought in January due to change of circumstances. He tried to do work. Elyan [his doctor] refused to certify him. Wisdom of it shown by the fact in June disabling condition appeared. I conclude it has not ceased.

He awarded the workman compensation at the rate of 8s. 10d. per week as asked. The employers appealed.

The appellants maintain that the learned judge was not entitled to make this award because they say there had been no change of circumstances since the last hearing in January. Properly to consider this matter it is therefore necessary to inquire into the history of the case since that date. A few days after the declaration of liability was awarded in Jan., 1935, the workman went back to work and asked for his old work. The foreman, Williams, asked him for a medical certificate that he was fit for it. The workman then went to Dr. Elyan to ask if he would certify him as fit for full work, and Dr. Elyan said that he could not. On this, the foreman said that he would not pass the respondent for his old work and the man continued doing light work, which produced the financial loss of 17s. 8d. a week, alleged in his application. Although it is true

that if there has been no change in the circumstances of a case since an award has been granted, no review can be entertained (*Crossfield & Sons, Ltd. v. Tanian* (1)), yet, where subsequent experiment has shown that a previous opinion based on expert evidence is wrong, a review is not debarred (see LORD COLLINS, M.R., in *Sharman v. Holliday & Greenwood, Ltd.* (2); *Mead v. Lockhart, Ltd.* (3)). The view of a learned judge as to a man's physical condition is a matter of opinion as to which there can be no estoppel; per LORD COZENS-HARDY, M.R., in *Dundee, Perth and London Shipping Co. v. Willcock* (4). The principle which underlies these cases is stated very clearly by FLETCHER MOULTON, L.J., in *Radcliffe v. Pacific Steam Navigation Co.* (5), at p. 691, thus:

Whether or not the matter is *res judicata* must depend solely upon whether the issue to be decided by the county court judge has already been litigated and decided between the parties . . . a decision as to the condition of the workman and the nature of his injuries did not constitute *res judicata*, because it was merely the expression of opinion based on the evidence then procurable, and that it might be corrected at a future time when experience and future developments had increased the materials for arriving at a correct conclusion.

In the present case, Dr. Elyan had consistently maintained at the first arbitration in Jan., 1935, that the man was not fit for heavy work. He said that the then condition of the knee was due to the operation and the removal of the cartilage. Dr. Griffith, for the employer, then said that he was quite fit to do pre-accident work as from Jan. 2, 1935. Among the reports which Dr. Griffith produced was one saying that there was probably some loose body which occasionally might get nipped between the bones of the joint, but the learned judge must be taken to have accepted Dr. Griffith's opinion that this was no more than a probability and on that probability granted a declaration when he terminated the compensation in Jan., 1935. Dr. Griffith, however, in giving evidence on Nov. 22, 1935, at the second hearing, said that a small portion of the knee cartilage had been left behind at the previous operation. This had been nipped, thus proving that his previous view that loose body might be nipped was correct, and there was a possibility that a little fringe of the synovial membrane was nipped. In cross-examination he admitted that in June, 1935, after further X-ray investigation, there was found to be definite disablement arising from something being nipped as stated above, which he thought was probable in January, but when he spoke in June was known definitely to have been present. This evidence may well have been thought by the learned judge to have confirmed the view expressed by Dr. Elyan on the earlier hearing that the condition of the knee was then due, at any rate in part, to the operation and removal of the cartilage, and the change of circumstances which justified

the judge in coming to the conclusion in Nov., 1935, that there was evidence that the workman was more disabled than he had thought to be the case in January is to be found in the evidence of Dr. Griffith that after the award in Jan., 1935, he had discovered in June, 1935, that a portion of the knee cartilage had been left behind at the operation and that it had become nipped. In my opinion, the judge was entitled, on this evidence, to reconsider his former opinion and make the award complained of.

The appeal fails and must be dismissed with costs.

GREENE, L.J. : I agree. The question in this case is whether a change of circumstances had taken place such as to justify the learned county court judge in reviewing his previous award. Two matters are relied upon as justifying his decision. The first is that after the award of Jan. 29, 1935, the respondent applied to the appellants' foreman for reinstatement in his original job and the foreman refused to let him do his old work without a certificate that he was fit for it. This application was made practically immediately after the award of Jan. 29, as we know that the application was made in January. In fact we were informed by counsel that it was made on the same day as the award. It is difficult to say from the very brief note of the learned county court judge's reasons with which we have been supplied to what extent he relied on this refusal by the foreman as being in itself a sufficient change of circumstances. In the argument before us it was said that the application and the refusal amounted to a practical test by the workman of his fitness in the labour market. It was said that the foreman as representing the employers must be taken to know what had happened in the proceedings before the learned county court judge and in particular that the respondent's doctor had considered him unfit, that the appellants' doctor had considered him fit and that the award had been made on the basis that as from its date he was fit for his old work. On this basis it was argued that the employers, notwithstanding the evidence of their own doctor and notwithstanding the award, had through their foreman refused to take the respondent back to his old work unless the respondent's own doctor certified him fit. In my opinion the matter cannot be so regarded. I do not think that knowledge of what had taken place at the hearing or of the nature of the award can in the circumstances be imputed to the foreman or that his refusal can be treated as a refusal to take the respondent back unless and until the respondent's own doctor changed his views. If there had been affirmative evidence that the foreman with full knowledge of what had happened had decided that in spite of the opinion expressed by the appellants' doctor and in spite of the decision of the learned county court judge he would decline to take the respondent back until his own doctor was satisfied, this might well have been treated

as a practical test of the labour market, but in my judgment the facts do not warrant such a conclusion.

The other matter which, if I read the notes of the learned county court judge's reasons accurately, was the principal matter which affected his mind, was this. At a date subsequent to the original award which is not clearly specified, but which was at any rate not later than the following June, the respondent suffered a disablement from which he was not actually suffering at the date of the award in January. This disablement was due to the fact that when his knee was operated upon (which was before the hearing in January) the whole of the cartilage was not removed and the portion left became nipped. It is not disputed that this disablement took place and continued for a substantial period. It is said that the occurrence of this disablement was a change of circumstances and that it showed that the opinion of the respondent's doctor given at the first hearing was justified. On the other hand, it is said that the possibility of such a disablement taking place was before the learned county court judge on the first hearing and that this possibility was taken into account by him when he made the declaration of liability. When the evidence which was before the court on the first hearing is examined it comes I think to this. The respondent's own doctor considered that the respondent's knee was in such a state that he was not fit for his old work. He did not mention this piece of cartilage or the possibility of its being nipped as a ground for his opinion nor does his evidence suggest that he knew that the piece of cartilage was there at all. The appellants' doctor on the other hand in his report of Jan. 22, 1934 (made twelve months before the first hearing) refers to the probability that there was "some loose body which occasionally gets nipped between the bones of the joint," but he said that there was no X-ray evidence of any such loose body. What he does not anywhere say is that this loose body, which I take to mean possibly a portion of cartilage, was at the date of the first hearing likely in any way to produce disablement in the future. The effect was this: that so far as the evidence went all that was before the learned county court judge on that hearing to direct his mind to the probability of nipping of a piece of cartilage was a tentative opinion of the appellants' doctor, unconfirmed by the X-ray photographs and not put forward as a reason for expecting disablement to occur in the future.

In these circumstances when at the second hearing it was established by clear evidence that there was in fact a piece of cartilage and that this piece of cartilage had in fact been nipped so as to produce a state of disablement lasting for a considerable period, this was in my judgment sufficient evidence of a change of circumstances to justify the review. If at the previous hearing it had been brought to the mind of the learned county court judge that there was in fact a piece of cartilage which was

liable to become nipped, if not at any moment, at least after a comparatively short period, and that this nipping would produce serious disablement, I think that he would have been justified at the first hearing in taking a different view of the case to which he did take. That fact and that possibility were not before him and as he himself says, "I have come to the conclusion that this workman was really more disabled than I thought in January." If this conclusion had merely been formed upon evidence of the same circumstances as existed in January I should agree that it amounted to nothing more than a reconsideration of his previous opinion which would have been insufficient to justify a review. But the conclusion was formed upon additional positive evidence of fact (as distinguished from conjecture) which was not before him, namely, the fact that the piece of cartilage was there, the fact that it had become nipped and the fact that the nipping had produced serious disablement. I am of opinion therefore that there was ample evidence of change of circumstances to justify the learned county court judge in deciding as he did. I agree that the appeal should be dismissed.

SCOTT, L.J. : I agree. I do not repeat the detailed history of the case which has been sufficiently stated by my brethren ; but the nature of the appeal and the contentions advanced in support of it raise questions of general importance. If those contentions were accepted the decision would in my view gravely upset the working of the statutory scheme for the periodic adjustment of weekly payments in correspondence with the degree of incapacity from time to time affecting the workman in actual fact. Whereas a jury assessing unliquidated damages for personal injuries has to forecast the future and make the best prospective estimate it can, the very essence of our legislative system of workmen's compensation is the avoidance of prospective estimates, and the correction of current assessments from time to time to make them correspond with reality. The reasons why I think that the argument for the appellants involves this disregard of the fundamental principle of the statute will appear in the latter part of my judgment.

The relevant facts are these. The respondent in Mar., 1933, had an accident within the statute. It injured his right knee and involved the removal of cartilage by surgical operation. He was, without any proceedings in court, paid weekly compensation on the basis of total incapacity till November of that year, and then on the basis of partial incapacity till Mar. 17, 1934. Payments were then stopped. On Jan. 29, 1935, His Honour JUDGE DUMAS, in an arbitration at the request of the workman, found after hearing evidence on both sides, that partial incapacity had not ceased but had continued during the period of discontinuance of payment, and awarded arrears accordingly. He decided that there was no longer any existing incapacity, but made a declaration of liability

to provide for the possibility of incapacity supervening thereafter. The respondent then tried to get work again from the appellants, but their foreman was afraid to take him on without a certificate from his doctor that he was not suffering from any incapacity. The doctor examined him, was satisfied that he had not recovered, and refused a certificate. In June, 1935, some definite new trouble developed due to the nipping of a piece of cartilage which had not been removed in the operation. In August the respondent filed an application for review, asking for an award on the basis of partial incapacity. Para. 6 of that application was as follows :

The applicant returned to work at the [employers'] works and it was found that he was unable to do his pre-accident work and consequently he is now earning 17s. 8d. less than his pre-accident wages and the medical opinion given at the hearing of the arbitration herein on behalf of the [employers] that the applicant was fit to do his pre-accident work has since been falsified.

The respondent also asked for payment of arrears from the date of the previous hearing. The appellants denied any present incapacity, but offered to submit to an order of 8s. 10d. from June to the date of the hearing—then fixed for Nov. 22. The case was heard by His Honour JUDGE DUMAS on that day. The respondent, the appellants' foreman, and doctors on each side gave evidence. In addition the judge's notes of the evidence given at the January hearing were treated as evidence and read to the judge, as were several reports of examinations made by the appellants' doctor of the respondent, in August and October, 1933, January and June, 1934, and Jan. 2, 1935, which had been read at the former hearing. The learned judge accepted the evidence of the respondent's doctor in preference to that of the appellants' doctor as to the respondents' present condition, found as a fact that there had been "change of circumstances," and on the basis of partial incapacity ordered payment of 8s. 10d., the amount claimed, including arrears from June.

For the appellants it was contended : (1) that there was no evidence of "change of circumstances" ; (2) that without such evidence the previous award was still binding and could not be altered ; and therefore (3) that the new award must be set aside as made without jurisdiction. Mr. Dale, for the appellants, conceded that the new trouble in June had constituted a "change of circumstances," but submitted on the evidence that that had passed away and left the respondent in the same degree of fitness for employment as at the date of the January hearing. For this reason he contended that on Nov. 22, 1935, the date of the hearing, his argument that there had been no "change of circumstances" was unaffected by the June circumstances. On this minor point if the judge had definitely held that the June aggravation had wholly passed away I should agree with the argument ; but I do not think any such assumption would be legitimate ; a definite finding of the learned judge

would be necessary. This reason alone would suffice to dismiss the appeal. I prefer, however, to base my decision on wider grounds, and therefore assume that Mr. Dale's contention as to the June aggravation is well founded. On this main question his argument really rested on an admission by the respondent's doctor in cross-examination that in his opinion the man's condition was "more or less the same now as in January"; for, said Mr. Dale, if it was the same there cannot have been any "change of circumstances" and the law is that without a "change of circumstances" there cannot be a "review" under sect. 11. In support of his argument he cited *Crossfield & Sons, Ltd. v. Tanian* (1). But in that case it was admitted by both sides that there had been no change of circumstance whatsoever, and the judgments all proceeded on that footing (see per A. L. SMITH, L.J., at pp. 630, 631, and ROMER, L.J., at p. 633). It is obvious that where the position is exactly the same in every way as at the date of the last award, any other treatment of the right of review would be open to the objection that it was conferring by a side wind a right of appeal on fact. But this decision was the spring from which have subsequently flowed considerable streams of argumentative interpretation, some equally clear, but some a good deal less clear than the original spring. The warning—should I say prophecy?—of VAUGHAN WILLIAMS, L.J. who dissented, is worth quoting (pp. 631 and 632):

I agree that it would be manifestly unfortunate if sched. I, clause 12 [now sect. 11 of the 1925 Act] could be used for the purpose of appealing against an award that one side or the other did not like, and I feel sure that the legislature did not intend that this power should be used for any such purpose; in the present case I think that an attempt has been made so to use it. But, though I have come to that conclusion upon the facts of this case, I know of no duty of the court, which is more difficult to exercise, or which ought to be more sparingly exercised, than what I may call the power of interlinear legislation—that is to say, of introducing into an Act of Parliament words which are not there. . . . It has been suggested that in the exercise of its powers of interlinear legislation the court should read in the words "if the circumstances are changed." I do not find those words in the clause, and I hesitate about reading them in. . . . I feel the greatest hesitation in editing an Act of Parliament, and reading in words which are not to be found there, though I have been much impressed by the fact that clause 12 is so drawn that it is open to abuse by using it as the means of giving an appeal that is not given by the statute itself.

I humbly concur in that wise warning—a warning quite unaffected in principle by the fact that his was a minority judgment. There is very great danger in an attempt to paraphrase statutory language, if a succession of subsequent decisions are to be regarded as decisions not on the statutory words but on the paraphrase which has taken their place. It is vitally important in every disputed issue to come back to the very words of the statute, and apply them, in their natural English meaning to the facts in evidence; see per LORD DUNEDIN in *Plumb v. Cobden*

Flour Mills Co. (6); and many other similar protests in the House of Lords. Where on a review justice appears on the evidence to call for an order in favour of the workman for some specific weekly payment, there must be a very clear case of *res judicata* by reason of a previous award before the judge can properly hold that the workman is estopped by judgment from receiving the benefit of the new order; and of course the converse applies where the employers are applying for an order ending or diminishing the weekly payments. In each case the onus of showing that the position is identical with what it was on the previous judicial occasion rests on the opposing party, and is, primarily at least, an issue of fact not law. If the county court judge after hearing evidence on both sides comes to a conclusion (there being evidence to support it) that he has not in truth been merely re-trying the previous issue; if he sees that there are differences, whether in the workman's physical condition, or in his knowledge of what he can do and cannot do, or in the scientific information available about his condition, or even in the clearer diagnosis of it by medical experts—in short if new light from any angle enables him to see that the position is not the same as before, in my opinion he is free to give effect to his view of what is just upon the evidence; there is nothing in the doctrine of *res judicata* to prevent him. The judgments in *Sharman v. Holliday & Greenwood, Ltd.* (2), and *Radcliffe v. Pacific Steam Navigation Co.* (5), which lay down these principles, illustrate what I have said, and show, I believe, that my suggested instances of fresh light are in conformity with the principles of those decisions.

My colleagues have analysed the evidence in the case and I entirely agree with their conclusions that there was ample material for the learned judge to reject the plea of *res judicata*. But I should like to add that whilst the onus on the hearing in first instance is heavy on the party alleging the estoppel, on appeal it is heavier still, since the appellant cannot succeed unless he can go so far as to show conclusively that there was no evidence at all on which the county court judge could reject the plea of *res judicata*.

There is only one other matter to which I wish to advert. Before the county court judge and also in this court the evidence led at the first hearing was treated by the parties as legally admissible on the second hearing—not merely in cross-examination of witnesses called also on the previous occasion, but as if it had been taken on commission in the second set of proceedings. To my mind this is a misconception. It was not legally admissible at all, although the parties by consent could submit it to the consideration of the court. I respectfully agree with and follow what ATKIN, L.J. as he then was, said in *India Rubber, etc., Co. v. Chapman* (7), at pp. 189 and 190:

Then the other matter is that the learned county court judge referred to evidence

which was given on a former hearing. That seems to me to be entirely wrong. The evidence that was given before, if it is material, has to be made evidence, and it may be subject to cross-examination in the light of subsequent events which may put a different complexion upon it. The learned judge, with respect, had no business, in an arbitration which took place on an application to review, to refer to evidence given in another arbitration unless that evidence was in some way or other made evidence in the second arbitration.

This point is important because it has a direct bearing on the question of law in this appeal. The attitude of the parties on it discloses a fundamental misconception of the nature of the estoppel upon which the decision in *Crossfield & Sons, Ltd. v. Tanian* (1) proceeded. Estoppel by judgment extends only to the decision itself and to the findings of fact necessarily underlying that decision—those upon which it rests in law; the estoppel does not extend to the details of evidence. The use of the record of the previous evidence in the court below obliterated this fundamental distinction altogether; and the argument even before us drifted away from the true *res judicata* point into a comparison of the details of evidence at the first arbitration and the hearing on review respectively, which is wholly wrong, as if those details had been a part of the judgment.

If it is desired to contrast the present with the former degree of capacity or incapacity (as the case may be) the previous witnesses should be called to give their evidence *de novo*. They can then be both examined and cross-examined for that purpose. This is the regular and proper course and incidentally it will prevent confusion between what the judge decided on the one hand and what the evidence before him was on the other.

I agree with the order proposed.

Appeal dismissed.

Solicitors: *James Turner & Son* (for the appellants); *Woolley, Tyler & Bury* (for the respondent).

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

TAYLOR v. WEBB.

[KING'S BENCH DIVISION (du Pareq, J.), **March 6, 1936.**]*Landlord and Tenant—Repair—Exception of fair wear and tear—Tenant's failure to pay rent—Independent covenants.*

A landlord covenanted in an underlease to keep the outside walls and roofs in tenantable repair as he was required by the head lease to do. The covenant in the head lease contained an exception of damage by fire and fair wear and tear. The tenant complained that the landlord had not in accordance with such covenant repaired certain glass roofs and skylights. The landlord contended that: (a) the want of repair complained of was within the exception; (b) the glass roofs were fixtures and therefore within a covenant by the tenant to repair the interior and all fixtures; (c) the tenant being in arrear with his rent could not sue upon the covenant to repair:—

HELD: (i) the repair here was not within the exception. Where there is a failure to repair defects due to fair wear and tear, the consequences which ensue because the defects grow and spread cannot always be said to be due to fair wear and tear.

(ii) the glass roofs were not fixtures but part of the building itself. A fixture is something brought on to a completed building.

(iii) the covenant to repair and the covenant to pay rent are independent and a breach of one is no defence to a claim in respect of a breach of the other.

[EDITORIAL NOTE.] This case discusses as between landlord and tenant the extent of the exception of fair wear and tear. The point in question here is when, in the case of a long-continued failure to repair, the exception of fair wear and tear may be said to cease to have effect, though the defects are not due to anything else than wear and tear. Failure to remedy defects due to wear and tear, especially in the case of a roof, leads to more serious defects due to the elements and natural causes, and so the results may go beyond fair wear and tear. The other points are also of interest, namely, whether skylights are fixtures or part of the roof, and whether the covenant to repair is independent of the covenant to pay rent.

AS TO THE EXCEPTION OF FAIR WEAR AND TEAR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 211, 212, para. 230; and FOR CASES, see DIGEST, Vol. 31, pp. 330, 331, Nos. 4736-4739.

AS TO NATURE OF FIXTURES AND GLASS FIXTURES GENERALLY, see HALSBURY, Hailsham Edn., Vol. 20, pp. 96, 97, para. 106; and FOR CASES, see DIGEST, Vol. 31, p. 324, No. 4658, and p. 331, No. 4743.

AS TO COVENANTS TO REPAIR AND TO PAY RENT BEING INDEPENDENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 240, 241, para. 267; and FOR CASES, see DIGEST, Vol. 31, p. 125, Nos. 2585-2592.]

Cases referred to:

- (1) *Terrell v. Murray* (1901), 17 T.L.R. 570; 31 Digest 331, 4749.
- (2) *Haskell v. Marlow*, [1928] 2 K.B. 45; Digest Supp.
- (3) *Boswell v. Crucible Steel Co.*, [1925] 1 K.B. 119; 31 Digest 324, 4658.
- (4) *Dawson v. Dyer* (1833), 5 B. & Ad. 584; 31 Digest 125, 2589.
- (5) *Edge v. Boileau* (1885), 16 Q.B.D. 117; 31 Digest 125, 2590.

ACTION for two quarters' rent due from the defendant to the plaintiff under an underlease of premises at Chelsea. The claim was admitted, but the defendant counterclaimed for damages for breach of the covenant

in the underlease to keep the outside walls and roofs of the demised premises in good and tenantable repair, fair wear and tear excepted. The underlease contained two covenants relating to repairs : a covenant by the tenant to keep the interior of the premises and the fixtures in good and tenantable repair, and a covenant by the landlord to keep the outside walls and roofs in similar repair, as he was required to do by the terms of the head lease. By the latter lease the landlord was required to keep the premises in good and tenantable repair, damage by fire and fair wear and tear excepted.

The premises were in fair repair when the tenant took possession in 1929. Some part of the premises was roofed with glass and lighted by skylights, and it was the landlord's failure to keep these in repair that gave rise to the counterclaim. Some repairs were done to them in 1933, but in 1934, in consequence of such want of repair, some of the rooms became uninhabitable.

In reply to the counterclaim, the landlord pleaded that the rent was payable in advance and that at all material times the defendant was in arrear with the rent, and that therefore the plaintiff was under no obligation to do the repairs.

J. Ricardo, for the plaintiff.

L. M. Minty, for the defendant.

DU PARCQ, J. [His Lordship stated the facts and reviewed the evidence] : The plaintiff's final contention was that the result of the exception of fair wear and tear was that the plaintiff's liability was strictly limited. He referred to *Terrell v. Murray* (1) as deciding that the plaintiff was not liable under that clause where the lack of repair was due to lapse of time and to the elements. I asked him in what possible circumstances the landlord would be liable, and he gave as an instance the case of the roofs being demolished by an earthquake. I am fortunately saved the task of considering many old cases because there is a recent one which is in point and is binding on me. I refer to *Haskell v. Marlow* (2). There the court had to consider the meaning of the words "reasonable wear and tear excepted" in a will under which the testator devised a lease of premises to his widow. She lived there for 42 years, during which time she did no active harm, but did nothing substantial to counteract the natural process of decay. It was held by the Divisional Court that it was impossible to say that the exception of reasonable wear and tear entirely protected her executors from liability under the repairing covenant.

I think it is plain that the judges in that case drew no distinction between "reasonable wear and tear" and "fair wear and tear," and I also am unable to do so in this case. SALTER, J., said at pp. 56 and 57 :

In my opinion, such words as "fair" and "reasonable" in an exception of this

kind qualify both the destructive agencies and also the dilapidation which they bring about. Such words can be used no doubt to qualify human user, but they could not be used to qualify forces of nature. It would be impossible to speak of an "unfair rain" or an "unreasonable frost." To bring dilapidations within the protection of such an exception as that in this case, I think that two things must be shown: first, that the dilapidations for which exemption is claimed were caused by normal human use or by the normal action of the elements, and, secondly, that they are reasonable in amount, having regard to the terms of the contract to repair the premises and the other circumstances of the case.

The same reasoning applies to the words "fair wear and tear." TALBOT, J., agreed, and expressed his view in a manner which is perhaps more closely applicable to this case. He said at pp. 58 and 59:

The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition as to everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.

I apply that language to this case in this way. The landlord's obligation to keep the outside walls and roofs properly repaired is subject to the exception that he is not liable for defects produced by fair wear and tear. It has been proved that the walls and roofs were not properly repaired, and it lies on the landlord to show that the lack of repair comes within the exception. In considering whether that has been proved, one has to remember that it is his duty to prevent consequences flowing from wear and tear which would not have occurred if the original defects had been attended to. If he fails to attend to them, it cannot be said that the consequences which ensue because the defects grow and spread and others come into existence are due to fair wear and tear. In this case the plaintiff fails to show that he is protected by the exception, because, whether he misunderstood his liability under the covenant or whether he did not choose to spend the money, he has done no more than tinker with the defects. They have been allowed to go from bad to worse. I think, therefore, that the exception only protects him to the very limited extent which I have mentioned. I have now to consider whether the skylights are part of the roofs, and therefore repairable by the landlord. Mr. Ricardo says that they are not, and that they are fixtures which the tenant is bound to keep in repair. I get some

assistance on that point from *Boswell v. Crucible Steel Co.* (3). There a tenant had covenanted to repair landlord's fixtures. The outside of the premises mainly consisted of plate-glass windows, and it was held that they were part of the structure of the building and were not included in the term "fixtures." I agree with what was said in that case, that fixtures are something brought on to a completed building, and which may belong either to the landlord or the tenant, but do not include something which is part of the building itself. I have no doubt that the skylights are part of the building, and I also think that they are part of the roofs, and that that was the intention of the parties. If they were not, it would mean that over part of the building there would be no roof.

The next point taken by Mr. Ricardo was that the defendant ought not to be allowed to claim damages for lack of repair because he had not fulfilled his part of the contract with regard to the payment of rent. Mr. Ricardo says that that breach goes to the root of the contract and cannot be compensated by damages, and, therefore, that the covenant to repair cannot be treated as an independent covenant. The tenant, it is said, must be in a position to prove that he has fulfilled his part of the contract before he can recover damages for breach of the repairing covenant.

The only authorities to which I propose to refer are *Dawson v. Dyer* (4) and *Edge v. Boileau* (5). Each of those cases concerns a covenant for quiet enjoyment, which, as one knows, is almost always in the form in which it appears in those two cases, namely: "The landlord covenants that the tenant paying his rent and performing his covenants shall quietly enjoy the premises without interruption from the landlord." At first sight one would think that the landlord might say that, until the tenant had performed his duty to pay the rent, he could not sue on the covenant. That was the contention in *Dawson v. Dyer* (4) in 1833, but it failed. It was pointed out that the landlord had a right of re-entry, but that, if he could not re-enter without breach of the covenant for quiet enjoyment, he might not do so even if the tenant had not paid the rent. That was followed more recently in *Edge v. Boileau* (5). There the court held that the covenant for quiet enjoyment and the covenants by the lessee to pay the rent and do repairs were independent covenants. I think that the present case is a stronger one than those, because none of the formal words of the covenant for quiet enjoyment are here to embarrass me. I hold that these covenants are independent covenants and that the tenant who has not paid the whole of the rent is yet entitled to claim damages, and that the non-payment of rent does not absolve the landlord from his duty to do the repairs. It is difficult to assess with precision the damages to which the defendant is entitled for that breach, but having regard to all the circumstances I assess them at

£130 and there must be judgment for the defendant on the counterclaim for that amount.

Solicitors: *Martyns & Gane* (for the plaintiff); *J. Prag* (for the defendant).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

Re BRACEY, HULL v. JOHNS.

[CHANCERY DIVISION (Clauson, J.), May 19, 27, 1936.]

Executors—Testator's business carried on—Creditors' right to interest—Rate of interest—Time from which interest runs—R.S.C. Ord. 55, rr. 62, 63.

Under clear powers contained in the will, dated Apr. 21, 1924, executors carried on the business of a testator until Aug., 1927, when an order was made for administration and for an enquiry whether it was for the benefit of the persons interested under the will that the business should be carried on. In Nov., 1931, the master issued his certificate, finding that it was for the benefit of such persons that the business should be carried on, and ordering an account of the debts incurred by the executors in so doing:—

HELD: (i) the creditors of the executors were entitled to interest on their debts.

(ii) such interest should be calculated at 4 per cent.

(iii) such interest should run from the date of the master's certificate.

[EDITORIAL NOTE.] The point here is simply the right of the creditors of executors who have been carrying on the business of the testator to receive interest on their debts, together with the two subsidiary matters of the rate of interest and the date from which it is to run.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 23, p. 389, paras. 725, 726; and FOR CASES, see DIGEST, Vol. 24, pp. 562-564, Nos. 6016-6025.]

Cases referred to:

- (1) *Finch v. Pescott* (1874), L.R. 17 Eq. 554; 24 Digest 697, 7214.
- (2) *Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342; 24 Digest 564, 6025.
- (3) *Re Dietz, Hodgson v. Dietz* (1910), Nov. 16 unreported, cited in Annual Practice, 1936, p. 1189.
- (4) *Re Bach, Walker v. Bach, Lloyds Bank v. Bach*, [1892] W.N. 108; 24 Digest 806, 8353.
- (5) *Re Shorey, Smith v. Shorey* (1898), 79 L.T. 349; 24 Digest 806, 8354.
- (6) *Re Gorton, Dowse v. Gorton* (1889), 40 Ch. D. 536; 24 Digest 609, 6405.

SUMMONS in administration action: further consideration.

The only substantial point for decision on the further consideration, the general form of the minutes having been agreed, was whether the creditors of the executors of the will of Albert Ernest Bracey, in respect of debts incurred by them in carrying on the testator's business after his death, were entitled not only to payment of the amount certified to be due to them in respect of their debts, but also to interest on those amounts, and whether such interest, if payable, should run from the date

of the master's certificate or from the date of the order for administration in the action.

The will of the testator, which was dated Apr. 21, 1924, contained a clear power to the executors to carry on his business, and that the executors proceeded to do until Mar. 25, 1927, when an administration action was started against the executors, by reason of dissatisfaction felt in connection with the attitude of the executor Sidney David Johns. On Aug. 3, 1927, an order was made for administration, and directing an enquiry whether it was for the benefit of the persons interested in the testator's estate to carry on his business. On that enquiry being held the master found that it was to the interest of the persons so interested, and particularly of the residuary legatee Frank James Page, that the testator's business should continue to be carried on, and an account was ordered of the debts incurred by the executors in so doing. The master's certificate made in accordance with that order was dated Nov. 21, 1931.

J. A. Mackintosh for the plaintiff, one of the executors of the will.

The first defendant, the executor, Johns, having died since the commencement of the action, proceedings were stayed against him.

Fergus D. Morton, K.C., and *H. Lloyd Williams* for the second defendant, Edward Crosby Peers, an executor of the will, and also a creditor of the executors for a debt incurred by them in carrying on the testator's business : The creditors are creditors within the meaning of R.S.C., Ord. 55, rr. 62 and 63, and as such are entitled to interest from the date of the administration order, i.e., Aug. 3, 1927. They are named in the master's order which was made as the result of an inquiry as to the creditors whose debts had been incurred by reason of the carrying on of the business of the testator.

CLAUSON, J. : They cannot be creditors of a dead man. They are creditors of the executors whose debts have to be provided for in the proper execution of the trusts.

Fergus Morton, K.C. : The word "creditor" in rule 62 has a wider significance than "creditor of the deceased," and includes creditors of the executors. The note as to the effect of the unreported case of *Re Dietz, Hodgson v. Dietz* (3) at p. 1189 of the ANNUAL PRACTICE, 1936, is against my submission, but there is no order of that date which says anything of the kind. Although these creditors are not strictly creditors of the testator, such creditors have always been recognised as creditors under an administration decree : see *Re Bach, Walker v. Bach* (4).

CLAUSON, J. : The point the learned judge was dealing with there was whether procedure by originating summons was possible. Does it carry the matter much further ? Rule 63 deals with the right of a man who is not entitled by law to interest on his debts but by the practice of equity gets interest as against the beneficiaries. Creditors of executors

are in quite a different position. They come in front of the claims of creditors of the testator.

Fergus Morton, K.C. : See also *Re Shorey, Smith v. Shorey* (5), which establishes that an administration order may be made at the instance of a judgment creditor, and *Re Frith, Newton v. Rolfe* (2), which is a case in which interest apparently was allowed. In this case, moreover, some of the business creditors have been allowed the costs of proving their debts by the master, and those costs are included in the master's certificate, so that, so far, the creditors have been treated as if they were within R.S.C., Ord. 55, r. 63.

Alternatively, if the creditors are not within R.S.C., Ord. 55, r. 63, they are within the rule under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, and the court has a discretion to allow interest as from any time after the date when the debts were incurred. In the present case there is every reason why the court should allow the creditors interest from the date when their debts were incurred, since they were incurred for the benefit of the residuary legatee, as it was expected he would want to succeed to the business when he became of age under the testator's will.

CLAUSON, J. : But these are debts in respect of which the creditors got what is equivalent to their judgment, i.e., the master's certificate, three years before the Act came into force.

Fergus Morton, K.C. : But you are to-day making an order that the creditors should be paid their debts. If the creditors sued the executors to-day, the court could, in that action, order interest as from the date when the debts were incurred. The reason why the creditors refrained from suing at an earlier stage was for the benefit of the estate.

Sir Gerald Hurst, K.C., and *Roger Turnbull* for the third defendant, Frank James Page, the residuary legatee : If *Re Dietz* (3) has the effect suggested in the ANNUAL PRACTICE, it would exclude not only interest down to the date of the certificate, but interest after that date.

This question depends on what, as a matter of law, is the executors' liability. The legal position of creditors of executors is well established : see *Re Frith* (2) and COTTON, L.J., in *Re Gorton, Dowse v. Gorton* (6) at p. 539. If the creditors cannot claim interest against the executors, and it is clear that, before the date of the certificate, no interest could have been claimed by the creditors in this case against the executors, the executors cannot be entitled to an indemnity against the estate for interest which they are not liable to pay. The certificate could not have any effect on that position so as to entitle a creditor who sues an executor after that date to interest. There is nothing in the certificate, which is merely the result of an inquiry as to what debts have been incurred by the executors in carrying on the business, to prevent the creditors subsequently suing the executors, and if an action were brought

by the creditors against the executors, the court before which it was brought would not give interest until the date of the judgment in that action.

The jurisdiction under the Law Reform (Miscellaneous Provisions) Act, 1934, arises only in proceedings for recovery of a debt or damages, and a question for further consideration in an administration action is not such a proceeding. But even if the court had such a discretion in these proceedings, it would not exercise it in favour of the executors who have done nothing to enforce their rights.

E. M. Winterbotham, for a pecuniary legatee under the will, who was still unpaid and was also claiming arrears of interest on his legacy, and *D. M. McQueen*, for the testator's widow, who was entitled under the will to a monthly sum of £4 6s. 8d. adopted *Hurst's* argument.

Fergus Morton, K.C., in reply: It is not correct to say that an executor's indemnity is limited to the amount for which he would be liable to a creditor: see WILLIAMS ON EXECUTORS, 12th edn., p. 1222. This is a proper case for the exercise of the court's discretion under the Act of 1934 since the creditors refrained from suing earlier in the interests of the residuary legatee.

CLAUSON, J.: The point which I have to determine is this: from the testator's death the executors, or subsequently the receiver in this action (the judgment in which was on Aug. 3, 1927), carried on his business until it was sold recently under the order on first further consideration. In 1931 it was certified that certain debts were due to creditors of the executors, such debts having been incurred by the executors in duly carrying on the business. There is no question in the present case but that the executors are entitled to be indemnified against those debts, and that the creditors in question are entitled by virtue of the executors' right of indemnity to be paid the certified debts out of the funds in court. I am, however, now called upon to determine whether those creditors should be paid interest and, if so, from what date, on the certified debts. The estate is amply solvent and there is a substantial residue. The debts did not of themselves carry interest.

It is not in dispute that the master's finding bound the executors and that if, immediately after the finding, a creditor whose debt had been thus duly found, had sued the executors he would have recovered, as of course, a judgment for the debt which would have carried 4 per cent. per annum interest from judgment. Nor is it disputed that if this had occurred the executors would be indemnified against any interest they might have to pay under the judgment. If, in order to avoid suffering such a judgment, the executors had advanced their own money to pay the debt, they would have been treated by the court as entitled not only to be indemnified against the debt, but also to be allowed

interest at 4 per cent. per annum on the money advanced by them to pay the debt (see *Finch v. Pescott* (1)). Under these circumstances it would seem reasonable that the court should treat the creditor as from the date of the certificate as in the same position as if he had, as at that date, not merely proved his claim so as to bind the executors, but also had obtained what he could as a matter of routine have obtained, a judgment carrying interest at 4 per cent. per annum in his favour. The court in discharging its functions as a court of equitable administration does not usually require those with whom it deals to go through mere idle forms, such as the obtaining of a formal judgment when the master's certificate amounts to a binding decision. It is accordingly not surprising to find that in the only reported case to which I was referred on this part of the case, viz., *Re Frith* (2), it would seem, though the report is not clear on the point, that KEKEWICH, J., in precisely analogous circumstances to those with which I have to deal, allowed the executors' creditors interest at 4 per cent. per annum on their debts, as from the date of the certificate. I have obtained the record in that case, and I find that the judge ordered interest at 4 per cent. per annum as from the date of the certificate, to be computed on the claimants' debt, and the other like debts previously certified, and ordered payment of the ultimate aggregate of those debts with that interest to be paid out of the estate. Curiously enough the order speaks of the debts as the testator's debts, though they were in fact debts of the executors; but I am satisfied on looking at the record and at the registrar's book that it was a case in which it was recognised that the proper practice was for the executors' debts properly incurred in carrying on the business to be paid out of the funds in court, with interest at 4 per cent. per annum from the date of the certificate finding them due. That practice seems to be entirely in accordance with principle, and I propose to follow it and to direct the like payment in the present case.

It was, however, argued that the debts in question ought to be paid with interest as from the administration judgment, and not as from the date of the certificate. It is not easy to see on what principle that should be done. The testator's own debts carry interest as from the judgment, in the appropriate circumstances, on the principle that an administration order ought to have a similar operation as regards interest on the testator's debts to a judgment, since it precludes the creditors from obtaining judgments of their own. This principle is the basis of R.S.C., Ord. 55, rr. 62, 63, which reproduce the rules which existed before the Judicature Acts and which crystallise the practice as regards debts of the testator. It is, however, as I venture to think reasonably plain that these rules are directed to the case of the debts of the testator, and do not cover the case of debts incurred by the executors, though the latter class of debts may become payable, as in the present case, out of the estate.

The point has, however, been decided by WARRINGTON, J., in *Re Dietz* (3), on Nov. 16, 1910. I have referred to the record in that case, and to the registrar's note of the hearing, as well as to the master's file, and it appears quite clearly that WARRINGTON, J., decided that rule 63 has no application to the case of debts incurred by the executors in carrying on their testator's business. The estate in that case was deficient to meet even those debts; accordingly the question whether or in what event such debts ought to carry interest as from the date of the certificate did not arise. There is nothing in the papers in that case to suggest that any doubt was thrown on the propriety, in the case of a solvent estate, of following the practice which KEKEWICH, J., had adopted in *Re Frith* (2).

I accordingly decide that the debts of the executors certified in the present case are to be treated as carrying interest as from the date of the certificate at 4 per cent. per annum.

Solicitors : *Botterell & Roche* (for the plaintiff and the fifth defendant) ; *Smith & Hudson* (for the second defendant) ; *Peacock & Goddard* (for the third defendant) ; *Waterhouse & Co.* (for the fourth defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

Re WARD, RINGLAND v. WARD.

[CHANCERY DIVISION (Clouston, J.), May 28, 29, 1936.]

Will—Construction—Trust of dividends, interest and annual income from certain shares—Capital distribution by company in respect of shares—Destination of sum distributed.

A testator by his will directed *inter alia* that certain shares in C.S. Co. were to be held by his trustees upon trust "to pay the dividends, interest and annual income to arise therefrom" for his wife for life and thereafter as therein declared, and that such shares were not to be sold or disposed of during the continuance of the trusts. By an article of C.S. Co. the company in general meeting might resolve that any surplus moneys in the hands of the company representing the moneys received or recovered in respect of or arising from the realisation of any capital assets of the company or any investments for the time being representing the same, instead of being applied in the purchase of other capital assets or for other capital purposes be distributed amongst the members on the footing that they received the same as capital and in the shares and proportions in which they would have been entitled to receive the same if it had been distributed by way of dividend. Surplus money or investments were defined as moneys or investments in the hands of the company over and above a sufficiency of other assets to answer in full the whole of the liabilities and paid-up share capital of the company for the time being. A resolution was passed for the distribution of certain moneys and a certain sum was duly paid by the company into the account of the trustees of the testator's will. Upon a summons to determine the destination of this sum:—

HELD: the sum must be treated as an accretion to the capital of the shares in the hands of the trustees of the will.

[EDITORIAL NOTE.] In the present case the distribution was made under an article providing for the distribution of the proceeds of the realisation of any capital asset. It was sought to rely upon *Hill v. Permanent Trustee Co.* (3) to show that this was income in the hands of the trustees; but that case was distinguished by the fact that there was no such article as the one purported to be acted on here.

AS TO CAPITAL AND INCOME, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 608-610, paras. 1073-1076; and FOR CASES, see DIGEST, Vol. 40, pp. 660-669, Nos. 1986-2061].

Cases referred to:

- (1) *Inland Revenue Comrs. v. Blott, Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, 663.
- (2) *Bouch v. Sproule* (1887), 12 App. Cas. 385; 40 Digest 665, 2035.
- (3) *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; Digest Supp.
- (4) *Re Bates, Mountain v. Bates*, [1928] Ch. 682; Digest Supp.
- (5) *Irving v. Houstoun* (1803), 4 Pat. App. 521.
- (6) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.
- (7) *Gimson v. Inland Revenue Comrs.*, [1930] 2 K.B. 246; Digest Supp.

ADJOURNED SUMMONS for the decision of question arising on the will of Frank Ward, who died on May 4, 1928.

By his will, which was dated July 31, 1925, the testator appointed his wife, his son Robert Ward, and Thomas Bassett Ringland and

Henry Houston Ormsby, to be the executors and trustees thereof. By clause 7 of his will the testator gave, devised, appointed and bequeathed the residue of his estate to his trustees upon trust subject to the provisions thereafter contained with respect to (*inter alia*) his shares in the Charente Steamship Co., Ltd., after payment of his debts, funeral and testamentary expenses and the pecuniary legacies bequeathed by his will, to pay the income to his wife for life or until re-marriage, and after her death or re-marriage upon trust for his children living at his death and the issue of any children who might die in his lifetime. By clause 9 of his will the testator made the following provision :

And with respect to the shares in the Charente Steamship Co., Ltd., held by me I direct that the following provisions shall have effect (that is to say) :

(a) The said shares are to be held by my trustees and are not to be sold or disposed of during the continuance of the trusts hereby declared in respect thereof.

(b) The said shares are to be held by my trustees upon trust to pay the dividends, interest and annual income to arise therefrom to my said wife Caroline Theodora Ward for and during the term of her natural life or until she shall marry again.

After the death of his wife the income from the shares was to be paid to the testator's children, and after the death of the survivor the shares were to be held in trust for their issue.

At the date of his death the testator held 10 shares of £1,000 each in the Charente Steamship Co., Ltd.

By art. 67 (a) of the company it was provided as follows :

The company in general meeting may from time to time and at any time resolve that any surplus moneys in the hands of the company representing the moneys received or recovered in respect of or arising from the realisation of any capital assets of the company or any investments for the time being representing the same instead of being applied in the purchase of other capital assets or for other capital purposes be distributed amongst the members on the footing that they receive the same as capital and in the shares and proportions in which they would have been entitled to receive the same if it had been distributed by way of dividend. For the purpose of this provision surplus moneys or investments means moneys or investments in the hands of the company over and above a sufficiency of other assets to answer in full the whole of the liabilities and paid-up share capital of the company for the time being.

And at an extraordinary general meeting of the company held on Sept. 12, 1934, it was resolved :

That pursuant to clause 67 (a) of the articles of association of the company the sum of £819,200, part of the surplus moneys in the hands of the company representing moneys received or recovered in respect of or arising from the realisation of certain capital assets of the company at present standing to the credit of "capital reserve account," instead of being applied in the purchase of other capital assets or for other capital purposes, be distributed amongst the members, on the footing that they receive the same as capital and in proportion to the shares held by them respectively in the company and that the managers be, and that they are hereby authorised and directed to distribute the same accordingly.

On Sept. 13, 1934, the sum of £16,000 was paid by the company into the account of the trustees of the will of the testator.

In the circumstances as above set out the question raised by the summons herein was whether the said sum of £16,000 formed part of the capital or of the income of the settlement of the testator's shares in the company.

C. Montgomery White, for the plaintiffs, two of the executors and trustees of the will, stated the facts.

Wilfrid M. Hunt, for the testator's widow: This £16,000 must be treated as income, on the authority of *Re Bates* (4), which was approved by the Privy Council in *Hill v. Permanent Trustee Company* (3), both of which cases are indistinguishable from the present one. When a company is a going concern it cannot make any distribution of its capital except by a reduction of capital.

CLAUSON, J.: But provided that a company keeps its capital intact, there is nothing which prevents it doing what it likes with what is left over. The reason for the decision in *Hill's* case (3) was that the constitution of the company there concerned did not allow such a distribution to be made, or to distribute capital except by a reduction of capital. It was not a decision that the money in the hands of the company was capital or profits. If the constitution of a company is such that it enables the company to make a distribution of capital assets, is there any authority which says that it cannot act in accordance with its constitution?

Hunt: The principle is laid down in *Bouch v. Sproule* (2) that a company cannot turn income into capital merely by saying it is capital. It must be capitalised. If there is anything left over, however it may be derived, whether from capital appreciation or from the company's business, it is profits, and must be treated as income unless it is capitalised. But capitalisation means capitalisation by the company, i.e., the retention of certain funds by the company which makes them part of its property. That has not been done here, and indeed the company has no power to increase its capital. This money is not to be provided for capital purposes of the company. It remains in the credit and loss account as cash. Art. 67 (a) is wrong, therefore, in so far as it calls the moneys to be distributed capital in the hands of the shareholders.

CLAUSON, J.: But in *Irving v. Houston* (5) a company having no power to increase its capital used something for capital purposes.

Gerald Upjohn, for the second and fourth defendants, who were each, subject to the life interest now vested in the widow in possession, entitled to a life interest in a quarter of the income of the £16,000 and also in the capital of the residuary estate of the testator: It is true to say that the only way of returning capital to shareholders is by having

a reduction of capital, provided the company has power to reduce its capital, if by capital is meant paid-up capital. But there is no authority for the proposition that surplus assets cannot be distributed amongst the shareholders without a reduction petition. It is quite clear that an ordinary company having power to pay dividends can distribute its excess assets by way of dividend, and, if there be an article which so authorises it to do so, it can return such surplus assets by way of capital. All that *Bouch v. Sproule* (2) is an authority for, is the proposition that the way a company treats any distribution is binding as to the character of that distribution as between the company and the shareholders. The testator in this case had been a shareholder in respect of these shares for many years and must have known of the provisions in clause 67 (a) of the articles.

A. C. Nesbitt, for the third and fifth defendants, who were in the same interest as the second and fourth defendants : This is a new case in the sense that there is no direct authority as to the position where (1) the company under its constitution has no power to increase its capital, and (2) there is a special provision in its constitution authorising a particular manner in which surplus assets may be dealt with. These factors distinguish this case from all the cases since *Bouch v. Sproule* (2). It is well settled that a company can, if it adopts the appropriate procedure, determine whether moneys available for dividends in the widest sense are to be treated as income or as capital. See *Irving v. Houston* (5), which was recognised in *Hill's* case (3). If a company has no power to increase its capital, it must signify its intention to distribute its profits as capital by a particular act. The particular act in this case is provided by the company's constitution, i.e., by clause 67 (a) of the articles, in which there is nothing illegal.

Hon. Denys Buckley, for the remaining defendants, the infant children of the testator's children : The proper way to approach this problem is first to find out what is the disposition of the testator, and then to find out what the company has done. The testator has dealt with these shares quite apart from any other shares, and what he has given is the dividends, interest and annual income of them to the tenant for life. Looking at the constitution of the company you have to consider whether these particular moneys are dividends, interest or annual income, or whether, having regard to the constitution of the company, they come to the trustees as capital, and ought to be regarded as capital for the purposes of the disposition contained in the testator's will.

Hunt, in reply : Art. 67 (a) was only put in to make this distribution not subject to tax. It was not intended to make any distinction between settled and unsettled shares. All it does is to let the shareholders know what their position is. The mere fact that the shareholders will not be subject to sur-tax does not mean that the tenant for life will not be :

see *Neumann v. Inland Revenue Commissioners* (6) at p. 228, and *Gimson v. Inland Revenue Commissioners* (7).

CLAUSON, J. : If money is not taxable, *prima facie* it is not income and the remainderman gets it.

Hunt : But see *Re Bates* (4) at p. 687. When the money reaches the hands of the trustees it is past history what the sources of it were. The mere fact that the amount is not subject to sur-tax does not mean that the tenant for life is not entitled to it.

CLAUSON, J. : The testator, by his will made in 1925, holding at that time certain shares in the Charente Steamship Company, made this disposition :

And with respect to the shares in the Charente Steamship Co., Ltd., held by me I direct that the following provisions shall have effect (that is to say) : (a) The said shares are to be held by my trustees and are not to be sold or disposed of during the continuance of the trusts hereby declared in respect thereof ; (b) The said shares are to be held by my trustees upon trust to pay the dividends, interest and annual income to arise therefrom to my said wife Caroline Theodora Ward for and during the term of her natural life or until she shall marry again.

There is a subsequent life interest to the children and a subsequent trust for the issue of those children. The testator died in the year 1928.

Those shares were shares in a company, the constitution of which, having regard to certain special resolutions which had been adopted in 1919, was as follows : Its share capital was £512,000, and by its articles it had no power to increase its capital, but of course it could, by taking the proper steps in accordance with the Companies Acts, have taken powers which would have enabled it to increase its capital. But at the time the testator made his will and, indeed, at the time of his death, and even now, the constitution of the company did not and does not enable its capital to be increased. The managers had power to declare dividends which would enable them to divide any profits which were available for dividend.

The company, however, retained to itself a power, exercisable in general meeting, but not entrusted to the managers, which was as follows. It is contained in art. 67 (a) and was adopted by a special resolution in 1910 :

The company in general meeting may from time to time and at any time resolve that any surplus moneys in the hands of the company representing the moneys received or recovered in respect of or arising from the realisation of any capital assets of the company or any investments for the time being representing the same instead of being applied in the purchase of other capital assets or for other capital purposes, be distributed amongst the members on the footing that they receive the same as capital and in the shares and proportions in which they would have been entitled to receive the same if it had been distributed by way of dividend. For the purposes of this provision surplus moneys or investments means moneys

or investments in the hands of the company over and above a sufficiency of other assets to answer in full the whole of the liabilities and paid-up share capital of the company for the time being.

According to the constitution of the company, if it had such assets as are described in that article, it could determine that those assets should not be left in the hands of the managers for them to declare dividends there-out, but that there should be a distribution of such assets among the members, who should receive the same as capital.

At a meeting of the company on Sept. 12, 1934, this resolution was assed :

Resolved : that pursuant to clause 67 (a) of the articles of association of the company the sum of £819,200, part of the surplus moneys in the hands of the company representing moneys received or recovered in respect of or arising from the realisation of certain capital assets of the company at present standing to the credit of "capital reserve account," instead of being applied to the purchase of other capital assets or for other capital purposes, be distributed amongst the members, on the footing that they receive the same as capital and in proportion to the shares held by them respectively in the company, and that the managers be and that they are hereby authorised and directed to distribute the same accordingly.

In other words, the managers were not to use this money to distribute it by way of dividends under their powers under art. 63, but they were, on behalf of the company to deal with it as the company were empowered by art. 67 (a) in general meeting to do, namely, to pay it over to the shareholders, who were to receive the same as capital. The trustees of this will in respect of the shares held by them on the trusts of the will received under this resolution the sum of £16,000. The question is whether they ought to treat that £16,000 as being capital of their trust fund, or whether they have authority, under the terms of the will, to pay over that £16,000 to the testator's widow in respect of her life interest.

The will directs the shares to be "held by my trustees upon trust to pay the dividends, interest and annual income to arise therefrom" to the widow. Can the phrase "dividends, interest and annual income to arise therefrom" be treated as covering this sum received in the circumstances which I have stated ; it is not a dividend in the ordinary sense, it certainly does not come within the term "interest," and it does not seem aptly described as "annual income." It appears to me that the trustees would be committing a breach of trust if they paid over the £16,000 to the widow under the authority given by those words. The testator has by the words which I have read, marked out the interest of the tenant for life. He was quite free to use a phrase which would have given to the tenant for life any distribution made by the company under the powers which the company had under art. 67 (a) of its constitution, but he did not use such a phrase. He must be taken to have known that there might be a distribution of what is normally called a

dividend, or that there might be a distribution under this special article of moneys which, according to the constitution of the company, were to be paid to the shareholders on the footing that they should receive the same as capital. I cannot think that he has indicated by the words which he has used that a payment of that character, which he must have known as a shareholder of the company might possibly be made by the company, was to be paid to the tenant for life.

In this connection I may refer to a passage in LORD SUMNER's judgment in *Inland Revenue Commissioners v. Blott* (1), at p. 218. LORD SUMNER was dealing with the decision in *Bouch v. Sproule* (2), and he pointed out that the question in that case (as in the case now before me) was how the settlement operated as between beneficiaries.

LORD SUMNER said :

In any literal sense of the word intention has nothing to do with the matter. The testator had none, for he never gave the question a thought ; the trustee had none, for his duty was to leave the law to settle the incidence of the benefits. He had no right, by electing to take the shares, to benefit the tenant for life to the prejudice of the remaindermen. The directors and the shareholders were strangers to the settlement and heard and knew nothing about it ; the company, in so far as intention is a mental act, was incapable of having any intention at all. The tenant for life and the remainderman had no intention except to get the most out of what had been done ; in the doing of it they had and could have had no hand at all. The intention, which the final decision assumed, was one of those so-called intentions which the law imputes ; it is the legal construction put on something done in fact. The testator had disposed of shares with regard to which the company could take a certain course. He was not affected by the Companies Acts but could determine for himself what should be capital and what income to the objects of his bounty or could leave it to be determined by others, including the company, just as he chose. The law deemed him to intend his disposition to apply according to whatever course in fact was taken, and by means of this assumption of his intention an effect was given to his disposition, which was consistent with the fact that the parties derived their rights solely from his bounty, although in circumstances in which, as a matter of fact, he had made no conscious disposition at all.

He explains that in that case the testator had not expressed any intention as regards the destination of the payment there in question, but that he had left it to the company to determine whether any payment to be made should be of a capital nature or an income nature. In the present case every precaution has been taken to make it quite clear that this payment which is in issue here was being made by the company as a capital payment and not as an income payment, and was made under an express power which was part of the constitution of the company while the testator himself held the shares.

It was, I think, conceded by counsel for the tenant for life that before the year 1930 there was no case in the books which laid down any principle which would be inconsistent with the decision which I have expressed in this judgment, but he suggested that there was to be found some

principle laid down in a Privy Council decision of *Hill v. Permanent Trustee Co. of New South Wales* (3) which precluded me from arriving at the decision which I have expressed. I have studied that case with some care, and, as far as I can see, the points which are material to the present case, namely, as to whether or not there is any objection to be made to the validity of an express provision such as I have in this case, enabling the company to make a payment by way of capital distribution, and as to the operation of such a provision, were not before the court in that case. The constitution of the company with which their Lordships were dealing contained nothing corresponding with art. 67 (a) and, as far as I can see, no such points as I have before me are covered by anything which was said in that case.

Accordingly, I decide that, upon the true construction of the will and in the events which have happened, the £16,000 mentioned in the summons must be treated as an accretion to the capital of the shares in the hands of the trustees of the will.

Solicitors : *Boxall & Boxall*, agents for *Edwin Boxall & Kempe*, Brighton (for all parties).

[Reported by C. M. YOUNG, Barrister-at-Law.]

HOWARD v. FURNESS HOULDER ARGENTINE LINES, LTD. AND A. & R. BROWN, LTD.

[KING'S BENCH DIVISION (Lewis, J.), May 25, 1936.]

Negligence—Escape of steam—Defective valve—Doctrine of Rylands v. Fletcher—Fixing of article not dangerous in itself but dangerous as fixed—Liability of contractor in tort.

The plaintiff was working as an electric welder in a boiler of a steamship when an explosion occurred and steam came in through the furnace door. After one vain attempt he succeeded in making his way through the door. He was badly scalded but suffered far more from shock and was rendered neurasthenic. The escape of steam was due to the fact that in a valve chest a bridge, in which a brass bush fitted, had been put in upside down. The valve had been assembled and fitted by the second defendants. The plaintiff alleged that both defendants were negligent in that the valve chest was made of cast iron. Against the first defendants he alleged negligence in not taking sufficient precautions against water hammer by securing effective drainage of the steam pipes, and that having brought the steam upon the ship they were liable under the principle of *Rylands v. Fletcher* (1) for not keeping it under control. Against the second defendants he alleged negligence in wrongly assembling and fitting the valve chest, contending that though there was no privity of contract they were liable in tort for supplying a dangerous article:—

HELD: (i) there was no negligence in using a valve chest made of cast iron.

(ii) there was no negligence in the shipowners in not having an improved system of drainage of the steam pipes to exclude the possibility of water hammer.

(iii) the doctrine of *Rylands v. Fletcher* was not applicable because there was no escape of the steam off the premises and the steamship owners were not making an unnatural user of their premises.

(iv) the defective bridge was not a source of danger which the first defendants knew or ought to have known, and they were not liable to the plaintiff as invitee or licensee.

(v) in re-assembling the valve with the bridge upside down the second defendants by negligent repair converted an article not dangerous in itself into a dangerous article and they knew of the danger which they were so creating. This imposed upon them a liability for injuries caused to the plaintiff, altogether apart from their liability arising out of their contract with the first defendants.

[EDITORIAL NOTE.] Of the various arguments urged on behalf of the plaintiff here only two are of outstanding interest. In the first it was sought to bring an escape of steam from a steam pipe on a steamship within the doctrine of *Rylands v. Fletcher* (1). This was defeated on two grounds: (a) no escape from the defendants premises; (b) no unnatural user of the premises. The second matter of interest is the liability in tort for supplying or fixing an article not dangerous *per se*, but which must be dangerous as supplied or fixed. On this point all the authorities were considered from *Levy v. Langridge* (21) down to the recent decision in *Otto v. Bolton & Norris* (18), and it was held that in such a case there was a liability in tort as well as in contract.

AS TO THE DOCTRINE in *Rylands v. Fletcher* (1), see HALSBURY, 1st Edn., Vol. 21, Nuisance, pp. 525-530, paras. 887-897, and FOR CASES, see DIGEST, Vol. 36, pp. 187-199, Nos. 311-388. AS TO LIABILITY IN TORT IN RESPECT OF DANGEROUS

ARTICLES, see HALSBURY, 1st Edn., Negligence, Vol. 21, pp. 407-409, Nos. 683-688, and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364.]

Cases referred to :—

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, 311.
- (2) *Filburn v. People's Palace & Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258 ; 2 Digest 238, 243.
- (3) *Sycamore v. Ley* (1932), 147 L.T. 342 ; Digest Supp.
- (4) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 ; 36 Digest 35, 208.
- (5) *Holmes v. North Eastern Ry. Co.* (1869), L.R. 4 Exch. 254 ; 36 Digest 38, 219.
- (6) *Wright v. London & North Western Ry. Co.* (1876), 1 Q.B.D. 252 ; 36 Digest 37, 216.
- (7) *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746 ; 36 Digest 41, 246.
- (8) *Earl v. Lubbock*, [1905] 1 K.B. 253 ; 36 Digest 63, 408.
- (9) *Hodge & Sons v. Anglo-American Oil Co.* (1922), 12 Ll. L.R. 183 ; Digest Supp.
- (10) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 ; Digest Supp.
- (11) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85.
- (12) *Parry v. Smith* (1879), 4 C.P.D. 325 ; 36 Digest 57, 356.
- (13) *Dominion Natural Gas Co., Ltd. v. Collins & Perkins*, [1909] A.C. 640 ; 36 Digest 28, 142.
- (14) *Humphery v. Bowers* (1929), 34 Com. Cas. 189 ; Digest Supp.
- (15) *Winterbottom v. Wright* (1842), 10 M. & W. 109 ; 36 Digest 63, 407.
- (16) *Longmeid v. Holliday* (1851), 6 Exch. 761 ; 39 Digest 458, 854.
- (17) *Heaven v. Pender* (1883), 11 Q.B.D. 503 ; 36 Digest 8, 9.
- (18) *Otto v. Bolton & Norris*, [1936] 1 All E.R. 960.
- (19) *George v. Skivington* (1869), L.R. 5 Exch. 1 ; 39 Digest 441, 705.
- (20) *Blacker v. Lake & Elliot, Ltd.* (1912), 106 L.T. 533 ; 39 Digest 458, 849.
- (21) *Levy v. Langridge* (1838), 4 M. & W. 337 ; 39 Digest 458, 852.
- (22) *Elliott v. Hall* (1883), 15 Q.B.D. 315 ; 36 Digest 44, 275.
- (23) *Caledonian Ry. Co. v. Mulholland*, [1898] A.C. 216 ; 36 Digest 14, 53.

ACTION for damages for negligence causing personal injuries. The relevant pleadings and the facts are fully set out in the judgment.

N. B. Goldie, K.C., and *F. Raleigh Batt* for the plaintiff.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the first defendants, *Furness Houlder Argentine Lines, Ltd.*

Frederic A. Sellers, K.C., and *H. I. Nelson* for the second defendants, *A. & R. Brown, Ltd.*

LEWIS, J. : In this action the plaintiff, Robert Hutton Howard, claims damages from *Furness Houlder Argentine Lines, Ltd.*, the ship-owners, and from *A. & R. Brown, Ltd.*, well-known marine engineers, alleging that through the negligence of them, or one or other of them, an explosion occurred which caused him injuries. He also claims that he is entitled to recover without proof of negligence, and I have heard argument upon this point. It has been contended that those who collect and generate steam upon their property do so at their own risk, so that if it escapes on their property and causes injury, a person on their property so injured is entitled to recover damages whether or not that escape is

attributable to negligence. The particulars of negligence in the pleadings allege the following matters :

Particulars of negligence (A) against the first-named defendants, Furness Houlder Argentine Linos, Ltd. These defendants their servants and agents were guilty of negligence : (a) in so managing the boilers of the said ship and steam pressure therein that an explosion occurred and steam escaped and scalded the plaintiff ; (b) in maintaining upon the said ship a defective starboard boiler in that the main stop valve thereof had been wrongly assembled and fitted and the bridge of the stop valve had been fitted upside down and further in that the valve chest was made of cast iron or other material not fitted to resist shock and in that the bush of the valve was held in place only by three dowell pins.

Pausing there for one moment, I find there was no negligence in having the valve chest made of cast iron. The pleading then goes on :

Further the pipes of the said boiler were not fully safeguarded against the risk of water hammer and there was no means of draining the after-end of the steam pipes or the inlet side of the isolating valve chest ; (c) in failing to warn the plaintiff that the said stop valve was defective when they knew or ought to have known of its condition and further knew on the morning of Feb. 27, 1935, that the main isolating valve chest was unduly hot or that there was a leakage from the main stop valves and that the said main stop valve was tightly closed.

Then there follows sub-para. (d), relying upon the Factory and Workshop Act, 1901, s. 11. Mr. Goldie, who appears for the plaintiff, abandoned that claim because the ship was not in dry-dock, and, as he told me, that section only applied to a ship in dry-dock. He however, pointed out, and made as part of his argument, the seriousness of having a boiler not in a proper condition. Mr. Goldie pointed out that the legislature considered it a serious matter, because they had actually passed an Act of Parliament which compelled a shipowner, when his ship is in dry-dock, to maintain a boiler in proper condition. However, no question arises now under that section. Then the pleading goes on :

The plaintiff will further rely upon the facts of the accident as proof of the negligence alleged and the plaintiff further says that the defendants their servants and agents generated high-pressure steam upon the said steamship and that the steam escaped and injured the plaintiff.

Then the allegations of negligence against the second defendants are for :

(a) wrongly assembling and fitting the valve chest as aforesaid ; (b) in supplying or allowing to remain as the material of the valve chest cast iron or other material not fitted to resist shock.

I make the same comment with regard to the valve chest here as I did in the case of the shipowners, and I find there was no negligence in having the valve chest made of cast iron. Then the pleading goes on :

(c) in securing the bush of the valve in place by inadequate means, namely, three dowell pins, or in failing to provide therefor more adequately. The plaintiff further contends that by their negligence or breach of duty these defendants created a trap

which they knew or ought to have known was a hidden danger to all those who worked on the said ship or were in any way brought near to the said boilers or to the said ship, and that they knew or ought to have known that the condition of the said valve and valve chest as aforesaid might cause or contribute to an explosion.

The facts as I find them are as follows. The plaintiff, Robert Hutton Howard, is an electric welder, fifty-five years of age. On Feb. 27, 1935, he was working in the port forward boiler of the s.s. "El Uruguayo," then lying in dock at Liverpool. He was working in a very confined space in darkness save for a small oil lamp. Whilst so employed there was a dull explosion and steam came in through the furnace door, which was ajar. The oil lamp was put out and the plaintiff crawled towards the furnace door which was his only means of exit. He opened the furnace door, the result of which was that there was a severe inrush of steam so that the plaintiff was driven back. He crawled to the back end of the tunnel in which he was working to a place where he hoped to be able to get out of the way of the steam. He stayed there a short time and then again approached the furnace door through which he crawled on to the stokehold floor where he collapsed. He was picked up and it was found that he was scalded and in a state of collapse. The scalds were not of a very serious character, but the effect of his extremely terrifying experience has undoubtedly been to render him neurasthenic and he was, when he gave evidence before me, still in a shaky condition. This renders it almost impossible for him to carry on his work as an electric welder, when not only has a certain amount of climbing to be done, but a steady hand is essential. His mate, who was called on his behalf, gave him a very high character as a skilled workman and took the view that he would never be able to work as a welder again. This perhaps is too pessimistic a view, but I am satisfied that as a result of this accident his earning capacity is greatly impaired and that he will never again attain to that high degree of skill and efficiency that was his before the accident. He had been earning something like £5 10s. 0d. a week and since the accident he has tried to do and has done a few days' casual work. Although before the accident he was not a robust person—having been operated on for duodenal ulcer, and having been, in consequence, absent from work at one period for four weeks—he was well able to do his work and was extremely proficient at it. As a result of his experience on Feb. 27, 1935, he cannot now do that work so efficiently, and one doctor stated that he probably would not get any better.

The after-port and after-starboard boilers were under steam for the purposes of working the donkey engine. Steam escaped into the main range of pipes in which there was some water caused by condensation. Owing to the fact that the vessel was lying down by the stern this water could not drain away, and upon steam getting into those pipes water hammer was set up, causing an explosion and the escape of steam which

scalded the plaintiff. The explosion and escape of steam could not have occurred but for the fact that the brass bush in the bridge of the after-starboard boiler lifted, thus causing the escape of steam into the main pipes. The reason for the lifting of the brass bush was that the bridge in which the brass bush lies had been put in upside down. The bridge is designed to hold the brass bush and the brass bush if properly placed in the bridge is so placed as to cause pressure to be exerted on a rim or collar which is larger than the hole which contains the bush itself, with the result that the bush cannot be forced out of place. The collar or rim should be on the under side of the bridge. The bush is held in position by three dowell pins. If the bush and rim or collar is inserted in the bridge the wrong way up, the rim or collar is entirely useless for the purpose for which it is intended, and the only means of preventing the bush lifting or being forced out of the bridge is by the dowell pins. These dowell pins may or may not be sufficient to hold the bush in position. In the present case obviously the dowell pins were insufficient to prevent the bush lifting out of the bridge. A considerable amount of evidence was given as to the length of time the dowell pins would hold the bush in position, when the bush was inserted upside down, and the opinion was expressed by some witnesses that it might remain in position for some years—by others, that it could only be so held for a few months. I have come to the conclusion that the bush may have been upside down from a date before Dec. 1934. How long the bush will remain in position when the bridge is upside down depends upon the fit of the dowell pins and the number of occasions on which, and the force with which, the valve is tightened up. The third engineer, Ernest Charteris, put it, in my opinion, correctly and clearly when he said that one shutting down might loosen it if it was not a good fit; on the other hand, it might stand several shuttings down if it was a good fit. He thought that the bridge might have been in that position for possibly twelve months. It is not so much a matter of time, but the number of occasions on which the valve is opened and shut, slackened and tightened. The shape of the bridge is such that the top side, though not identical with the lower side, bears a very strong resemblance to it. There was produced to me in court a valve identical to the one concerned in this case, with a similar bridge and bush, and its working was explained to me. If the bridge were coated with oil, dust and dirt it would be impossible to distinguish that part of the bridge which is made of cast iron and that part which is made of brass.

On Feb. 27, 1935, the fifth engineer of the s.s. "El Uruguayo," Owen Percival Williams, was instructed by the second engineer, Thomas Arthur Owen, to overhaul the three main steam valves at the distribution box. In carrying out those instructions Williams felt the chests with his hand and found them hotter than usual. This indicated to him that one

of the valves of one of the boilers with steam on was leaking. In fact, at the time two of the six boilers were under steam, those boilers being the after-port and after-starboard boilers. Williams went to these boilers and first tightened up the valve on the after-port boiler, which was in order. Then he proceeded to the valve of the after-starboard boiler, and when he put the spanner on to tighten the valve he noticed that instead of tightening, it was slackening. This indicated that there was something wrong, and he immediately went to inform the second engineer. Before Williams reached the second engineer's cabin, there was a hissing sound of a rush of steam, and though he heard no noise of explosion, he knew that something had gone wrong, and, indeed, the fracture of the valve chest had occurred and the escape of steam had taken place, which escape of steam caused the plaintiff his injuries. It was then found that the bush, which had previously lifted, had come practically out clear of the bridge.

On these facts the question which I have to decide is whether or not the plaintiff has satisfied me that his injuries were caused by the negligence or the neglect of a duty owed to him by one or other of the defendants. Mr. Goldie argued as against the first defendants that quite apart from negligence, the plaintiff was entitled to recover, his contention being that anyone who generated steam, which was a dangerous thing on his premises, and the s.s. "El Uruguayo" came within the category of "premises" for this purpose, did so at his own risk so as to impose upon him an absolute liability for injury caused by the escape of that steam. He contended that the doctrine of *Rylands v. Fletcher* (1) applied. I am unable to accede to this argument. In the case before me there was no escape of steam from off the defendant shipowners' "premises;" the injuries caused to the plaintiff were caused on the premises of the plaintiff on which the steam was generated. Mr. Goldie was unable to cite any case to me in which the doctrine of *Rylands v. Fletcher* (1) had been held to apply to damage caused to a person on the premises of the person keeping the thing likely to do damage, in other words, where there had been no escape from off the premises of the person keeping the thing. He cited to me the case of *Filburn v. People's Palace and Aquarium Company, Ltd.* (2), and *Sycamore v. Ley* (3), cases which in my view had no application to the facts in the present case and in no way support the principle contended for. I am also far from satisfied that the owners of the steamship by generating steam therein were making an unnatural use of their steamship. For these and other reasons I am not satisfied that the doctrine of *Rylands v. Fletcher* (1) is in any way applicable to the facts in this case.

As against the first defendants, Mr. Goldie further argued that there was a duty owed by them to the plaintiff to protect him from dangers which they knew or ought to have known, and relied upon the principle laid down

by WILLES, J., in *Indemaure v. Dames* (4), as to the duty of an owner of premises to "invitees." The well known passage is at p. 288, where WILLES, J., said :

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know ; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

Whether or no the plaintiff was an invitee he was certainly a licensee with an interest and therefore has the same rights as an invitee (see *Holmes v. North Eastern Railway Co.* (5) ; *Wright v. London & North Western Railway Co.* (6) ; *Sutcliffe v. Clients Investment Co., Ltd.* (7). This contention as to the duty owed by the first defendants was not contested by Mr. Clothier on their behalf and the case against them was fought and argued on that footing, which I am of opinion is the right footing.

The fact that the bridge was placed upside down was undoubtedly an unusual danger—this danger caused the explosion as a result of which the injuries to the plaintiff were sustained. In the statement of claim and in the argument of counsel it was suggested that the explosion would not have occurred but for the fact that there was some water in the main pipes ; the presence of water set up "water hammer" when the steam as a result of the leak rushed into the pipes, and it was said it was negligent on the part of the shipowners not to have such a system of drainage of the pipes as to allow all water to drain away even when the vessel was down by the stern. A very small quantity of water in the pipes caused by condensation when coming in contact with an inrush of steam will set up water hammer and I am not prepared to find that the shipowners were negligent in not having an improved system of draining such as was suggested. The boilers and system generally was a system approved by those best qualified to judge ; no question had ever been raised about it ; it had been provided by skilled and competent engineers and I hold that any suggestion of negligence under this head fails. I find that the real cause of the explosion was the escape of steam owing to a leak, the result of the bush in the bridge working out. The bush worked out because the bridge was placed upside down. The placing of the bridge upside down was a source of danger. Was it a danger of which the first defendants were aware or ought to have been aware ?

In Dec., 1934, the valve in question was stripped for the purpose of the annual survey and after survey was re-assembled by the second defendants. In fact the surveyor found that the seat of this valve required attention. This was done by the second defendants before it was re-assembled. After that re-assembly the vessel made one voyage

in the course of which this valve was tightened and slackened or opened or shut, on perhaps three or four occasions. I accept the evidence called on behalf of the shipowners, the first defendants, that no one for whose acts they were responsible touched that bridge or in fact dismantled the valve between Dec., 1934, and Feb. 27, 1935. There was no occasion for them to do so and in fact they did not do so. They did not know that the bridge was placed upside down and therefore did not know of the danger created by the bridge being placed in this position. The question as to whether they ought to have known depends, in my opinion, whether the fact that the bridge was in this position could have been discovered by the exercise of reasonable care on the part of the engineers on board. I have carefully considered the evidence given on behalf of the plaintiff and on behalf of both the defendants as to this. The first defendants have satisfied me beyond all doubt that they did not know of this danger and that they could not by the exercise of any reasonable care have discovered it and that it therefore cannot be said that they ought to have known of it. It follows, therefore, that the plaintiff has failed to establish any breach of the duty owed to him by the first defendants and there must be judgment for the first defendants with costs.

Turning now to the case against the second defendants, in view of my finding that the ship's engineers did not touch the bridge or dismantle the valve in question between the time that the valve was re-assembled by the second defendants and Feb. 27, it follows that either the bridge was in an upside down position when the second defendants dismantled the valve and was not taken adrift by them from the columns and nuts which hold it in place and was not noticed by them to be upside down, or that they did take it adrift and when re-assembling it together with the rest of the component parts of the valve they placed it upside down. In Dec., 1934, all the boilers, six in number, were stripped for the purpose of the survey. Five of the boilers were stripped and after survey were re-assembled by the ship's engineers; the sixth which was the after-starboard boiler was stripped and re-assembled after survey by the second defendants. The bridge of the valve of this boiler was the bridge which was at the time of the plaintiff's accident found to be upside down. The seat of the valve after it was stripped was found to be in need of tightening, and the surveyor ordered this to be done. The second defendants in accordance with their contract with the first defendants took the seat and spindle ashore where it was made tight and then returned to the ship to be re-assembled. It is contended, and, in my opinion, rightly contended, that although the duty of the second defendants was not to overhaul but merely to strip for survey, that duty involved the proper re-assembling of the valve after any work ordered by the surveyor had been done by the second defendants. I am driven to the conclusion that the representatives of the second defendants

took off the bridge and that when re-assembling it placed it upside down on the columns. If, contrary to my finding that the second defendants took the bridge adrift, the bridge remained on the columns, I am satisfied that the bridge was sufficiently cleaned to enable anyone after taking out the spindle and handling the bridge, even if it was still on the columns, by the exercise of ordinary care and skill to detect that the bridge was the wrong way up. In either event there was a lack of care and skill on the part of the second defendants.

But Mr. Sellers, who appeared for the second defendants, argued strenuously that even if there had been this lack of care the plaintiff could not recover against his clients in that there was no privity of contract between the plaintiff and his clients. The first defendants had contracted with the second defendants for the second defendants to open up for survey the boiler mountings of the after-starboard boiler and in fact the second defendants were paid by the first defendants for opening up the mountings on the starboard after-boiler for examination and survey, main and auxiliary stop valve, main and auxiliary check valves, top and bottom shut-off cocks and safety valves, removing old mountings for repairs, refacing seats with machine, grinding in valves, easing spindles, and it was contended that even if the second defendants failed in their duty to do this properly, such failure was only negligence arising out of the contract, for which negligence they could only be liable to the first defendants.

My attention was drawn to a number of cases among others *Earl v. Lubbock* (8) ; *Hodge & Sons v. Anglo-American Oil Co.* (9) ; *Donoghue v. Stevenson* (10) ; *Grant v. Australian Knitting Mills, Ltd.* (11) ; *Parry v. Smith* (12) ; *Dominion Natural Gas Co. v. Collins* (13) ; *Humphery v. Bowers* (14) ; *Winterbottom v. Wright* (15) ; *Longmeid v. Holliday* (16) ; *Heaven v. Pender* (17) ; *Otto v. Bolton and Norris* (18) ; and Mr. Sellers placed particular reliance on the judgments in *Earl v. Lubbock* (8) ; the judgment of SCRUTTON, L.J., in *Hodge's* case (9), at p. 186 ; a passage in the opinion of LORD WRIGHT in *Grant's* case (11), at p. 107 ; and the judgment of ROWLATT, J., in *Humphery v. Bowers* (14).

Now, although it is well established that only a party to a contract can complain of a breach of contract, negligence, apart from contract, gives a right of action to persons injured by that negligence. This was pointed out by ROWLATT, J., in *Humphery v. Bowers* (14), at p. 197, where he says :

Now, no doubt where one person's person or property may be endangered by want of care and skill of another there are many classes of circumstances in which a duty of care or skill does arise independently of contract on the part of the latter towards the former. For breach of such a duty resulting in damage an action in tort will lie, damages being of the gist of the action.

I refer also to the passage in the opinion of LORD MACMILLAN in *Donoghue v. Stevenson* (10), at pp. 609 and 610, where he says:

It humbly appears to me that the diversity of view which is exhibited in such cases as *George v. Skivington* (19) on the one hand and *Blacker v. Lake & Elliot, Ltd.* (20), on the other hand—to take two extreme instances—is explained by the fact that in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well-established doctrine that negligence, apart from contract, gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject. "It appears," says Sir Frederick Pollock, *LAW OF TORTS*, 13th Edn., pp. 570, 571, "that there has been (though perhaps there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect. The authorities formerly relied on for this proposition really proved something different and much more rational, namely, that if A. breaks his contract with B. (which may happen without any personal default in A. or A.'s servants), that is not of itself sufficient to make A. liable to C., a stranger to the contract, for consequential damage. This, and only this, is the substance of the perfectly correct decisions of the Court of Exchequer in *Winterbottom v. Wright* (15) and *Longmeid v. Holliday* (16). In each case the defendant delivered, under a contract of sale or hiring, a chattel which was in fact unsafe to use, but in the one case it was not alleged, in the other was alleged but not proved, to have been so to his knowledge. In each case a stranger to the contract, using the chattel—a coach in the one case, a lamp in the other—in the ordinary way, came to harm through its dangerous condition, and was held not to have any cause of action against the purveyor. Not in contract, for there was no contract between these parties; not in tort, for no bad faith or negligence on the defendant's part was proved."

In the same case LORD ATKIN deals exhaustively with the previous decisions on this point and gives a careful analysis of the cases. With regard to *Earl v. Lubbock* (8), he says at pp. 591 and 592:

The next case is *Earl v. Lubbock* (8). The plaintiff sued in the county court for personal injuries due to the negligence of the defendant. The plaintiff was a driver in the employ of a firm who owned vans. The defendant, a master wheelwright, had contracted with the firm to keep their vans in good and substantial repair. The allegation of negligence was that the defendant's servant had negligently failed to inspect and repair a defective wheel, and had negligently repaired the wheel. The learned county court judge had held that the defendant owed no duty

to the plaintiff, and the Divisional Court (LORD ALVERSTONE, L.C.J., WILLS and KENNEDY, JJ.) and the Court of Appeal agreed with him. Sir R. HENN COLLINS, M.R., said that the case was concluded by *Winterbottom v. Wright* (15). In other words, he must have treated the duty as alleged to arise only from a breach of contract; for, as has been pointed out, that was the only allegation in *Winterbottom v. Wright* (15), negligence apart from contract being neither averred nor proved. It is true that he cites with approval the dicta of Lord Abinger in that case; but obviously I think his approval must be limited to those dicta so far as they related to the particular facts before the Court of Appeal, and to cases where, as LORD ABINGER says, the law permits a contract to be turned into a tort. STIRLING, L.J., it is true, said that to succeed the plaintiff must bring his case within the proposition of the majority in *Heaven v. Pender* (17), that anyone who, without due warning, supplies to others for use an instrument which to his knowledge is in such a condition as to cause danger is liable for injury. I venture to think that the Lord Justice is mistakenly treating a proposition which applies one test of a duty as though it afforded the only criterion. MATHEW, L.J., appears to me to put the case on its proper footing when he says the argument of the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that any one in this employment had a cause of action against the defendant. "It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on." I entirely agree. I have no doubt that in that case the plaintiff failed to show that the repairer owed any duty to him. The question of law in that case seems very different from that raised in the present case.

Then the learned Lord deals with *Blacker v. Lake & Elliot* (20), *Winterbottom v. Wright* (15), and *Earl v. Lubbock* (8). I will not read the whole of it, but on pp. 593 and 594 he deals with the point that in the previous cases all that was alleged and proved was negligence arising out of the contract, and he points out that there might be negligence quite apart from any contractual liability.

In the present case the case against the second defendants is laid in tort, in negligence apart from contract, and it is necessary to see whether or not, quite apart from contract, there was any duty owed to the plaintiff by the second defendants and neglected by them.

In *Hodge's* case (9), upon which considerable reliance was placed by Mr. Sellers, SCRUTTON, L.J., in the course of his judgment after referring to *Earl v. Lubbock* (8), and all the other cases says this at p. 187:

But side by side with the English cases already referred to there are a series of cases in which the supplier of a thing which does injury owing to its dangerous condition has been held liable to persons with whom he has no contract, for damage caused by the thing supplied. I refer to such cases as *Levy v. Langridge* (21), *Elliot v. Hall* (22), *Parry v. Smith* (12) and the much-doubted case of *George v. Skivington* (19). I do not think it is profitable to discuss these cases at length, but only refer to the exhaustive judgment of HAMILTON, J., in *Blacker v. Lake & Elliot Ltd.* (20), where these difficulties are dealt with. For it seems to me as regards an article safe if properly constructed or repaired, but dangerous because of negligent construction or repair, where the defendant does not know of the danger, we are bound by *Earl v. Lubbock* (8) to hold the defendant is not liable to persons with whom he has no contract for damage caused by the dangerous article. It may

be otherwise where he himself invites the plaintiff and his class to use the article without examination, which is probably the explanation of the majority judgment in *Heaven v. Pender* (17)

Then the learned Lord Justice goes on to say this :

But all the cases cited distinguish the case of a thing in its nature dangerous without warning, described by Lord Shand in the *Caledonian Railway Case* (23)

and so on, and at the end of the passage he says this :

I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two ; it is a wolf in sheep's clothing instead of an obvious wolf.

In the present case, finding as I do that the second defendants in re-assembling this valve placed the bridge upside down, I think that they by negligent repair or construction converted an article not dangerous in itself into a dangerous article and that they knew of the danger which they were so creating. This imposes upon them a liability for injuries caused to the plaintiff—a liability altogether apart from a liability for negligence arising out of the contract with the first defendants, and that the contention of Mr. Sellers therefore fails.

I have already dealt with the seriousness of the plaintiff's injuries, and, I think, that the proper sum to which he is entitled is £955 10s. 0d., including special damage. There must be judgment accordingly against the second defendants for that amount, with costs.

Judgment for the first defendants with costs to be paid direct to them. Judgment against the second defendants with costs. In the third party proceedings judgment for the second defendants without costs.

Solicitors : *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff) ; *Weightman, Padder & Co.*, Liverpool (for the first defendants) ; *Laces & Co.*, Liverpool (for the second defendants).

[Reported by FRANK ROWE, Esq., Barrister-at-Law.]

PAYNE v. THE DEPUTY FEDERAL COMMISSIONER OF TAXATION.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Russell of Killowen, Lord Wright, M.R., Sir Isaac Isaacs and Sir George Rankin),
May 21, 22, June 23, 1936.]

Privy Council—Australia—Income tax—Income derived from English investments—Return made in Australia—Currency in which return must be expressed.

The appellant, a resident in Australia, included in his return for the purposes of federal income tax £5,671 interest on investments in England, received and retained to his account in England. The assessing officer added to the amount returned £1,097, the difference between £5,671 in English currency and the amount produced by converting that sum into Australian currency. The appellant contended that the £5,671 could not be included at any other figure. By the Australian Income Tax Acts the amount of income tax payable is ascertained by reference to a rate based on a calculation of pence per pound of taxable income :—

HELD : for a proper calculation of the income tax payable the assessable income of the taxpayer must be expressed in Australian currency and the £1,097 was properly added.

[EDITORIAL NOTE.] In order to calculate the tax payable in the country of assessment, it must be expressed in the currency of that country, and that principle applies equally in the case of a self-governing dominion, where the pound has a different value to that prevailing in England. The case can be contrasted with the recent English one of *Rhokana Corpn., Ltd. v. Inland Revenue Comrs.*, [1936] 2 All E.R. 678, where the income was payable abroad in a foreign currency but was being taxed in this country. There was in that case no need for conversion into the foreign currency.

AS TO RETURNS FOR INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 11, para. 9.]

Case referred to :

- (1) *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1934] A.C. 122 ; Digest Supp.

APPEAL by Arthur Ernest Tyndall Payne from two judgments of the High Court of Australia, one dated Apr. 30, 1934, given by the Full High Court answering certain questions on a case stated by DIXON, J., the other, dated May 9, 1934, given by DIXON, J., dismissing, pursuant to such answers, the appellant's appeal against his assessment for federal income tax for the year 1931-32, made under the statutes of the Commonwealth of Australia.

The facts of the case, which were not in dispute, appear in the judgment of their Lordships delivered by LORD RUSSELL OF KILLOWEN.

Sir William Jowitt, K.C., and *J. H. Bowe* for the appellant.

Gavin Simonds, K.C., and *Wilfrid Barton* for the respondent.

LORD RUSSELL OF KILLOWEN : The facts relevant to this appeal are not in dispute. The appellant, a resident in Melbourne, Victoria,

returned his gross income for the purpose of federal income tax at £20,173 and included therein the sum of £5,671 as interest on British funded stock, such sum having been received by him by credits to his account with the Union Bank of Australia, Ltd., in London, and retained in England. From his gross income he claimed certain deductions, returning his net income at £14,831. The assessing officer added to the total amount so returned a sum of £1,097, representing the difference between the said £5,671 and the sum which would be produced in Melbourne by the telegraphic transfer upon the respective dates of credit of the sums constituting the said £5,671. The appellant made objections claiming that the sum of £5,671 should not be included at any other figure. His objections were disallowed, and thereupon under the provisions of the Commonwealth Income Tax Assessment Act, 1922-1932, were treated as an appeal, and the matter was transmitted to the High Court of Australia for hearing. The appeal came before DIXON, J., who stated a case for the opinion of the Full Court of the High Court, setting out the facts and asking for the opinion of the Full Court upon the following questions :

1. (A) Was the commissioner right in including in the said assessment or assessments the said amount of £1,097 ;

or (B) ought the commissioner to have included no more, in respect of the interest aforesaid, than the sum of £5,671 ;

2. If both the preceding questions are answered "no," upon what basis ought the amount to be included in the appellant's assessment in respect of such interest to be ascertained ?

The judges of the High Court were divided in opinion as to the answers which should be given. GAVAN DUFFY, C.J., and EVATT and McTIERNAN, JJ., were of opinion that the assessment was correctly made and answered the questions accordingly. RICH, STARKE, and DIXON, JJ., were of the contrary opinion, relying largely as it appears to their Lordships upon a decision of the House of Lords in the case of *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* (1). By virtue of the Commonwealth Judiciary Act, s. 23, the opinion of the Chief Justice prevailed, and by an order made by DIXON, J., dated May 9, 1934, the appeal was dismissed. Their Lordships are of opinion that the appeal was rightly dismissed. The question appears to them to depend upon the true meaning and construction of the Income Tax and Income Tax Assessment Acts of the Commonwealth of Australia.

Liability to income tax in Australia is imposed by Acts of a permanent nature, called Income Tax Assessment Acts, supplemented by annual Acts, called Income Tax Acts, which fix, among other things the rate and amount of the tax. In this case the return, the correctness of which was challenged, is dated Sept. 18, 1931. The relevant Acts to be considered are the Income Tax Assessment Act, 1922-1931 (herein-

after called the Assessment Act) and the Income Tax Act, 1931 (No. 24 of 1931) which will be referred to as the Taxing Act and which by sect. 2 provides that the Assessment Act "shall be incorporated with and read as one with this Act." By the Assessment Act, s. 4, "assessable income" means in the case of a resident the gross income derived from all sources whether in Australia or elsewhere, and "taxable income" means the amount of income remaining after all deductions allowed by the Act have been made. By sect. 13 the tax is to be levied and paid for each financial year upon the taxable income derived, directly or indirectly, by every resident from all sources, whether in Australia or elsewhere, during the period of twelve months ending on June 30 preceding the financial year for which the tax is payable. By sect. 32 there is imposed upon every resident (not being a company) whose total assessable income is not below specified sums, an obligation (which was binding on the appellant) when called upon by notice in the Gazette, to

furnish to the commissioner in the prescribed manner a return setting forth a full and complete statement of the total assessable income derived by him during the financial year ending on the preceding June 30.

Sect. 35 is in the following terms :

From the returns and from any other information in his possession, or from any one or more of these sources, the commissioner shall cause assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied.

It will be observed that the Assessment Act imposes upon the taxpayer the obligation of supplying the materials from which the commissioner is to be able (with or without any other information in his possession) to discharge his duty of assessing the taxpayer in an amount of taxable income "upon which income tax shall be levied."

Turning now to the Taxing Act. The tax is imposed by sects. 3 and 6. Sect. 3 provides that income tax is imposed at the declared rates. Sect. 6 provides that it shall be levied and paid for the financial year beginning on July 1, 1931. The rates are declared by sect. 4, to be the different rates in respect of the different kinds of income respectively set out in the nine schedules to the Act. In every case the amount payable is ascertained by reference to a rate based on a calculation of pence per pound. It will be sufficient to refer to sched. 2, which is the schedule relevant to the said £5,671. It runs thus :

SECOND SCHEDULE.

RATE OF TAX UPON INCOME DERIVED FROM PROPERTY.

For the purposes of this schedule— T=taxable income in pounds.

If the taxable income does not exceed £500, the rate of $\left\{ \begin{array}{l} 3 + \frac{T}{100} \end{array} \right\}$ pence.
tax for every pound of taxable income shall be ..

If the taxable income exceeds £500 but does not exceed
 £1,500, the rate of tax for every pound of taxable
 income shall be $\left\{ 1 + \frac{T \times 14}{1,000} \right\}$ pence.

If the taxable income exceeds £1,500 but does not exceed
 £3,700, the rate of tax for every pound of taxable
 income shall be $\left\{ 4\frac{3}{4} + \frac{T \times 23}{2,000} \right\}$ pence.

If the taxable income exceeds £3,700 the rate of tax for
 every pound of taxable income up to and including
 £3,700 shall be $\left\{ 4\frac{3}{4} + \frac{3,700 \times 23}{2,000} \right\}$ pence.
 and

the rate of tax for every pound of taxable income
 in excess of £3,700 shall be 90 pence.

There can be no manner of doubt that these Australian Acts, in referring to pounds and pence, are referring to those units of Australian currency known as pounds and pence respectively and to nothing else. The income tax payable by a taxpayer to the Australian revenue is to be fixed by means of a calculation which involves the multiplication of an ascertained number of one kind of units of Australian currency by the scheduled number of another kind of units of Australian currency, the product being the resultant number of Australian pence. It seems necessarily to follow that to enable this calculation to be made, the assessable income of the taxpayer must, whatever be the currency in which he derives it, all be expressed in terms of Australian currency; in other words if any portion of his assessable income is derived by him in French or Belgian currency, it must before he can be properly assessed to Australian income tax be converted into its equivalent, at the time it was derived, in Australian currency. In exactly the same way, any income derived by him in British currency must be converted into its equivalent in Australian currency. In short when an Australian statute tells the taxpayer to state his derived income in order that a fraction thereof (i.e., so many pence in the pound of derived income) may be taken as tax, this can only mean that his derived income is to be stated and dealt with in terms of Australian currency. From this it would accordingly follow that the commissioner was right in including the amount of £1,097 in the appellant's assessment. It was, however, contended that a recent decision in the House of Lords was inconsistent with this view and was conclusive in the appellant's favour on the present appeal. Their Lordships are unable to agree with this contention. The case referred to is *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* (1). The actual decision related to a matter very far removed from the question now under consideration. The actual decision was this: That an obligation to pay a preference dividend of (say) £5 which was originally payable in England, but which

by an alteration of the company's articles, binding on the preference stockholder, had been made payable only in Australia, was effectively discharged by a payment in Australian currency, although the stockholder in England received, owing to the rate of exchange, less than £5 in English currency. Their Lordships can see nothing in that decision inconsistent with the view that for the purpose of assessing an Australian taxpayer to income tax under the Australian revenue legislation, it is necessary that his assessable income should be expressed in terms of Australian currency. It was said, however, that some of the Lords who took part in the debate on the *Adelaide* case (1), expressed a view which entitled the appellant to say that the £5,671 which he derived in England in British currency should figure in his income tax return, though made in terms of Australian currency, at the same figure and no more. The view in question is a view expressed in terms by three of the noble Lords, viz., that the unit of account symbolised by the £ and originally carried by the early settlers from England to Australia had never been changed, but had remained the same as a measure of obligation, though the discharge of the obligation so measured might be affected by fluctuations in the currency which was legal tender *in loco solutionis*. Their Lordships are unable to see anything in the views so expressed which would justify, still less necessitate a construction of the Assessment Act and the Taxing Act other than that which they have indicated above: viz., that in order to calculate Australian income tax at a rate of so many pence per pound of "taxable income," it is essential that the "assessable income" should be expressed in terms of Australian currency.

For the reasons which they have indicated their Lordships are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors: *Burton, Yeates & Hart* (for the appellant); *Coward, Chance & Co.* (for the respondent).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

OWNERS OF THE STEAMSHIP "GRAINTON" v. OWNERS
OF THE STEAMSHIP "GENUA."
THE "GENUA."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J., and Trinity Masters), **May 19, 1936.**]

Shipping—Collision—Consequential damage—Beaching—Negligence by damaged vessel—Aggravation of damage.

The "Genua" having been damaged in collision was taken in tow to Dover and there beached. She was beached at a spot where the damaged parts were unsupported and the extent of the damage was thereby greatly aggravated. It was found that there was no failure of ordinary nautical skill in the beaching:—

HELD: (i) in order to succeed on the question of consequential damage the defendants must show that the plaintiffs were guilty of negligence in the beaching of the ship.

(ii) the finding of the judge and the elder brethren that there had been no failure of ordinary nautical skill was a finding of no negligence.

(iii) though there was no **actual** danger of the ship sinking immediately, the master had not unlimited time in which to decide upon the proper course to pursue, and it was necessary for the defendants to show that he had been unduly ignorant or unduly careless.

[EDITORIAL NOTE. The judgment in this case contains a very full discussion of the subject of consequential damage due to the negligence of the plaintiffs.

AS TO CONSEQUENTIAL DAMAGE, see HALSBURY, 1st Edn., Vol. 26, Shipping, p. 538, para. 790; and FOR CASES, see DIGEST, Vol. 41, pp. 769, 770, Nos. 6240-6253.]

Cases referred to:

- (1) *The Metagama* (1927), 29 Lloyd L.R. 76, 253.
- (2) *The City of Lincoln* (1889), 15 P.D. 15; 41 Digest 770, 6248.
- (3) *The Pensher* (1857), Sw. 211; 41 Digest 770, 6255.
- (4) *H.M.S. London*, [1914] P. 72; 41 Digest 805, 6659.
- (5) *The Mellona* (1847), 3 Wm. Rob. 7; 41 Digest 690, 5194.
- (6) *Anderson v. Hoen, The Flying Fish* (1865), 3 Moo. P.C.C.N.S. 77; 41 Digest 769, 6241.

ACTION for damage caused by a collision off Beachy Head in foggy weather. The case is only reported upon the point of consequential damage and the relevant facts on that aspect of the case are set out in the judgment.

Kenneth Carpmael, K.C., and *H. L. Holman* for the plaintiffs.

R. F. Hayward, K.C., and *H. G. Willmer* for the defendants.

LANGTON, J.: This is a case of a collision in fog between an English and a German steamship, and has been of some importance by raising very clearly a point as to consequential loss by stranding. Mr. Carpmael, the leading counsel for the plaintiffs, has put at my disposal the very

clear statements of the law on this matter to be found in the case of *The Metagama* (1) which have not, I think, received the attention in this country that they clearly merit. As I have founded my judgment upon the law as stated in that case in the House of Lords I will refer later to the case in some detail. Although it was a Scottish case, I would add that I have the best of reasons for knowing that the counsel first referred to at p. 76 as George Lambton was, in fact, a well-known English counsel practising in the English Admiralty Court and his name is not accurately recorded.

[His Lordship then dealt with the facts of the collision and the apportionment of blame and found the "Grainton" four-fifths to blame and the "Genua" one-fifth.]

After the collision the "Grainton," which had been struck on the port side just abaft her bridge, was in need of some form of rescue. Her Nos. 2, 3 and 4 holds filled pretty rapidly to the water level and, unfortunately, owing to the broken pipe in No. 1 hold, the water began to percolate from No. 2 into No. 1, and so far as the master could judge at the time was percolating faster there than he was able to deal with by means of the pumps. To his assistance came tugs from Dover, and Lloyd's agent, and a Trinity House pilot—one of the Cinque Ports pilots—Mr. Maltby. The master took council with Mr. Maltby and with Lloyd's agent, and upon their advice, and with the assistance of Mr. Maltby, decided to beach the vessel in Dover Harbour in a situation, speaking generally, which is known as good beaching ground, and is recommended, and was, I think, recommended second-hand in this case by the harbour master, Captain Iron. The vessel was beached upon a place that could be verified, and was subsequently verified by Mr. Rogers who gave evidence on behalf of the defendants. That place may be shortly described as a little to the eastward of the customs house and with the stem of the vessel (and I think Mr. Rogers measured it) 122 ft. from the supporting wall. Mr. Rogers made it I think 122 ft. from the concrete of the wall to the stem of the vessel. Now various questions were mooted as regards this beaching, but in the end the issue was narrowed to a perfectly clear and simple issue, and that was whether this vessel was properly or improperly beached in the position actually selected, that is to say the question as to whether they were right or wrong to beach her went by the board and the whole point at issue between the parties was as regards the selection of this particular spot. Now the candour with which this part of the case was dealt with made it very simple to bring this issue to a fine point, and to deal with what, in other circumstances, might have been a troublesome subject. Mr. Scott, on behalf of the plaintiffs, made the most candid admissions—first that it was not possible to get the buckling which this vessel, the "Grainton," subsequently got in this place upon a perfectly flat bottom.

Further he said "I agree that the vessel as placed was not supported in the way of the collision damage." "I agree," he said, "that she sagged to the extent of 3 ft. while on the beach at Dover," and if he thought that this point was in any sense unimportant, let me say that I have regarded it as of the gravest importance in this case. The vessel was badly damaged by the collision but not as it would appear very expensively damaged. By reason of being placed in this position on the beach where the collision damage was unsupported by a flat bottom the expense of the damage, as I understand, was enormously aggravated. Therefore, it is very understandable that this point has been pressed with the greatest insistence. Indeed, the question becomes very insistent in view of Mr. Scott's very fair and candid admission. He did not attempt to dispute that this grave aggravation of the damage was caused by the actual position in which she was placed. If a practically flat bottom had been selected this damage could never have been done.

Now first of all it becomes, I think, material to get the law upon this matter perfectly clear. I say this with some contrition because at an early stage in the case Mr. Carpmael asked for some greater precision as regards this issue than appears in the pleading. Para. 4 of the defence says :

The defendants specifically deny that the damage sustained by the "Grainton" through beaching was a consequence of the said collision as alleged in the statement of claim or at all and they further deny that such damage was unavoidable.

I do not myself understand, now the matter has been thrashed out, why no application was made for particulars, but in order that the matter may no longer remain in any obscurity I will cite from the House of Lords' opinions in *The Metagama* (1) the passages which seem to me to make it perfectly clear that the onus of such an election is upon the defendants. The defendants cannot succeed in a case of this kind unless they are in a position to allege and prove negligence on the part of the plaintiffs in dealing with their damaged vessel. I think there has been for some time some haziness with regard to this position in the law, but a consideration of these opinions leaves me with no doubt at all that that is the proper legal position. In *The Metagama* (1) the damaged ship (a ship damaged by collision) was in the Clyde, and although she assumed various positions on various banks in the Clyde, in the end the point which had still to be debated in the House of Lords was the one simple question as to whether those in charge of the vessel were negligent or not in failing to use their engines to keep the vessel stern first on the ground, and it is a little important in considering this case (and the facts are rather involved) to remember that was the crucial question which was debated in their Lordships' House. VISCOUNT

HALDANE, who occupied the woolsack on that occasion, deals with the matter in these terms on p. 253 :

But I do not agree that it has been proved that there was such a *novus actus* assuming the form of negligence—

I would at once stress that point, “a *novus actus* assuming the form of negligence”—

on the part of those in charge of the “Baron Vernon” in not using the engines. Negligence was not established in the other particulars alleged against those in charge. Apart from the question of not using the engines there were three other allegations of negligence made against those in charge of the “Baron Vernon” when in the first position on the north bank. It was alleged at the trial that they should have obtained the assistance of tugs ; next, that the steamship should have had her moorings out ; and, thirdly, that she should have filled her aft ballast tanks. If, contended the appellants, these precautions had been taken, the steamship would have remained in position No. 1, and could have been easily and inexpensively salvaged. But on these three allegations the Lord Ordinary, after hearing the evidence, negatived them and found the facts in favour of the respondents. It is only in the averment of negligence in not using the engines that he decided against the respondents ; and the learned counsel for the appellants are stated in the judgment of the Lord Justice-Clerk to have abstained from challenging the judgment against them on the other grounds referred to.

It will be observed that throughout that first case he speaks uniformly of negligence, and only negligence, as founding, for the purposes of a case of this class, what is sometimes a little unhappily called a *novus actus interveniens*. I think I had better proceed at the bottom of p. 253.

My Lords, I therefore turn at once to the crucial question in the case, was there fault in those responsible for the ship in reference to the use of her engines when she was on the north bank ? Now this is a question of evidence, and in weighing the evidence in order to draw the proper inferences there are certain principles which have to be kept steadily in view. When a collision takes place by the fault of the defending ship in an action for damages the damage is recoverable if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created. Further, what those in charge of the injured ship do to save it may be mistaken, but if they do whatever they do reasonably, although unsuccessfully, their mistaken judgment may be a natural consequence for which the offending ship is responsible, just as much as is any physical occurrence. Reasonable human conduct is part of the ordinary course of things, which extends to the reasonable conduct of those who have sustained the damage and who are seeking to save further loss. These propositions were laid down and applied by LINDLEY, L.J., and his colleagues in the Court of Appeal in *The City of Lincoln* (2). They are in accordance with what was said in 1857 by DR. LUSHINGTON in *The Pensher* (3). It follows that the burden lies on the negligent ship to show by clear evidence that the subsequent damage arose from negligence or great want of skill on the part of those on board the vessel damaged.

I will pause there for a moment to say that, for my own part, I would

wish that VISCOUNT HALDANE had omitted "great want of skill," but it may be useful when one comes to deal with a question of seamanship.

It is their duty to do all they can to minimise that damage, but they do not fail in this duty if they only commit an error of judgment in deciding on the best course in difficult circumstances.

Then he goes on to deal with *The City of Lincoln* (2) and with *H.M.S. London* (4) in illustrating his proposition, and concludes this passage by saying :

The burden of showing that the chain of causation started by the initial injury has been broken lies on the defenders. In order to discharge this burden they must prove that the breach in the chain was due to unwarrantable action and not merely to action on an erroneous opinion by people who have *bona fide* made a mistake while trying to do their best, which is all that is shown to have happened in the present case. This seems to me to be the standard in the light of which we must examine the evidence of what occurred in the position on the north bank.

And then, at the conclusion of his opinion, after dealing with the whole of the facts, he says, at p. 255 :

My Lords, the conclusion at which I have arrived is based on the principle which requires the appellants in a case such as this to discharge the burden of proof, and also on a survey of the evidence.

VISCOUNT DUNEDIN gives the next opinion, and he was at variance with VISCOUNT HALDANE and the majority upon the actual question as to whether it was negligence or not on the part of those in the "Baron Vernon" in not working their engines astern, but he was not I think all at variance upon the principle laid down by VISCOUNT HALDANE. At p. 256 he says this :

My Lords, I shall now say a few words on the law of the case, as to which I believe there is no substantial difference of opinion. The "Metagama," having been in fault for the collision, is liable for the damage occasioned thereby, and if the ship with which she collided sinks subsequently to the collision, she is, if no more is to be said, liable for that sinking. That is what DR. LUSHINGTON said in the cases of *The Mellona* (5) and *The Pensher* (3). But it is always the duty of the person who is damaged to do his best to minimise his loss. This is really the same thing as to say that if he might reasonably have avoided any part of the damage he has suffered, to that extent the damage is not such as arises directly from the act complained of. In many cases the question is stated as to whether after the original fault which started matters there has been a *novus actus interveniens* which was the direct cause of the final damage. *Novus actus interveniens* may be the act of a third party, so that in this case I think the best way of stating the proposition is, was the pursuer guilty of such negligence after the collision as to make that negligence the direct cause of the final damage ?

Now here again there is no question as to the act of a third party. The master of the "Grainton" was still in charge of his vessel and he elected to act upon the advice which he received, so I think again one can exclude this somewhat ambiguous expression of *novus actus interveniens*

and say that in this case the proposition for which the defendants must contend is this, that the plaintiffs were guilty of such negligence after the collision as to make that negligence the direct cause of the final damage. VISCOUNT DUNEDIN proceeds at p. 257 :

Now, here the negligence alleged is the failure to use the engines to maintain the vessel's position on the north bank. Whether this failure to use the engines was negligence is a question of fact.

And it is on that question of fact that he and LORD PHILLIMORE differed from the majority. Now LORD SHAW, who formed part of the majority of the House with VISCOUNT HALDANE and LORD BLANESBURGH, also deals with this legal aspect of the matter. At p. 260 he quotes from LORD CHELMSFORD's judgment in *The Flying Fish* (6). He says :

As to the law, the judgment of LORD CHELMSFORD in the case of *The Flying Fish* (6) still remains of outstanding authority. . . . LORD CHELMSFORD himself puts the general question in this form : " Taking the whole of the evidence on both sides into consideration, can it be said that the conduct of the captain of the " Willem Eduard," after he had run his vessel on shore in consequence of the collision, did not exhibit a want of nautical skill and a gross neglect of duty ? " My Lords, it is quite possible to excise the word " gross " as going beyond the necessities of the proposition, but when that is done there remains a large ground in law, as I think there is in reason, for a court of law refraining from blame, in cases of urgency and emergency, when a variety of courses may occur to the mind of those in charge. This is especially so when the interest of such persons is all in favour of saving the vessel, if that is humanly possible. I am of the opinion that the Second Division came to a sound conclusion in declining to attribute such blame. Whether there was error in judgment—a point upon which I have great doubt—it is not necessary to determine, but that there was culpable, or anything sufficiently approaching, negligence on the part of the pilot or the captain, I disbelieve.

I do not think it is necessary for me to cite any passage from LORD PHILLIMORE's or LORD BLANESBURGH's opinion, because they do not differ at all from that which is laid down by the other Lords.

It is a very simple question of fact in this case which has to be determined. As Mr. Hayward pointed out there were no circumstances of urgency or emergency such as existed in *The Metagama* (1). Whatever else was happening the " Grainton " was not sinking quickly. These expressions of urgency and emergency are, after all, expressions indicating degree, and in considering this point, the elder brethren and myself have borne in mind that although there may not have been an actual emergency the captain of this vessel had not got unlimited time in which to make up his mind as to what was the proper course to pursue. Now that being the law on the matter I have put to the elder brethren in the first place (and it is I think in the first place for them) whether there was any failure in ordinary nautical skill—which seems to me to be the appropriate way of dealing with this question from a nautical

standpoint—in placing the “Grainton” upon this place. On that they have answered me that in their view they are quite clear there was no failure of ordinary nautical skill in so acting. Now in so far as it is a matter for me to translate that into terms of negligence I have no hesitation at all in saying that their advice (which I most unhesitatingly accept) indicates no negligence in this case. It is clear that the defendants, in order to succeed, must show that the plaintiffs have been guilty of negligence. They would show that if they could show that the master of the “Grainton” in taking the action which he did, had been failing in ordinary nautical skill—in other words that he had been either an unduly ignorant, or unduly careless master of the ship, and if so had acted with negligence or carelessness. I think the defendants in such a case are entitled to have ordinary nautical skill, and that test I think was clearly accepted by counsel on both sides. Mr. Carpmael did not claim that he should have shown less than ordinary nautical skill. So, armed with the opinion of the elder brethren, I am quite satisfied that there was no negligence in this case in placing the vessel exactly where she was placed on that particular day. That is not to say that I do not think that the point is not an important one, or is not an insistent one, but it is I hope a perfectly clear finding that there was no negligence on the part of the “Grainton” in this matter. If I were to add reasons for this I should probably weaken the opinion I have received, nor can I get all the reasons that have determined the elder brethren in giving me their advice, but I may say for my own part (and I think they are with me in this) that the facts which I certainly have taken into account, and which they have taken into account, are these. The leakage in No. 1 hold was at the moment one of unascertained amount, and was a disturbing factor—not an urgent or emergency factor, at least at the time of the collision, but it was a factor in the situation. The master sought and obtained advice from the competent authorities and particularly as to the selection of this spot. Not only was he in the hands of a competent Cinque Port pilot but in addition to his duty it appeared that he happened to bathe every day in the summer time in this part of Dover Harbour and was particularly acquainted with the bottom level in that locality; but they had also the harbour master’s recommendation that this spot off the customs house was an appropriate and happy spot for beaching. They had behind them the experience of some years. Other vessels had been beached on that spot, not it is true in this position in so far as that it was far up on the beach, but in this locality where this beaching was attempted. The grounding, again, had to be effected in darkness and without an opportunity of measuring the exact extent of the damage, or appreciating exactly how a strain might come over the weakened portion of the vessel. All those matters appear sufficiently obvious after the event, but one has to put oneself

in the position of the master and pilot who were dealing with a situation which could not be ascertained with anything like the accuracy that it can now be ascertained.

Finally there is a tidal stream running across this beach and, as I think was not observed by counsel, running under a viaduct of the adjacent mole. This the elder brethren think may have increased the difficulties in beaching, and possibly also made it desirable to take the ground firmly as soon as possible.

In fact, dealing with the case from afterwards it seems to be one in which even if an error was made and one can class it as such, though I do not so find, it was an excusable error owing to the circumstance that the "Grainton" happened to be a vessel in ballast and though weighted by a considerable load of adventitious water was, in fact, a lighter draught ship than any which had recently been beached in that vicinity.

That, I think, concludes all that it is necessary to say upon that point, and upon that point of consequential damage the defendants fail.

Solicitors: *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the plaintiffs); *Stokes & Stokes* (for the defendants).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

THE OWNERS, MASTER AND CREW OF S.S. "FINLAND" *v.*
THE OWNERS OF THE "CORNISH ROSE" CARGO AND FREIGHT.
THE "CORNISH ROSE."

[PROBATE DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., with a Trinity Master), **June 11, 1936.**]

Shipping—Collision—Salvage.—Admissions in pleadings—Inferences from admissions—Admissibility of logs.

The "Cornish Rose" was in the English Channel, unable to steam or to steer and in danger of becoming even more helpless. The "Finland" brought her into safety after 22 hours hard work. The facts were admitted upon the pleadings and the plaintiffs sought to put in the defendants' log in support of the inferences which they desired to draw as to the nature of the services. On the other side it was desirable to check these inferences by the entries in the logs of the Lizard and Land's End lighthouses:—

HELD: although the facts were admitted there was no objection to the admission of the logs for this purpose.

It is desirable that notice be given in advance to the other side of the document intended to be put in, so that they may be ready with any other admissible document directed to the same issue.

[EDITORIAL NOTE.] It is settled practice that where admissions are made upon the pleadings, no further evidence is admissible upon that issue. The decision here is that where it is sought to go beyond such admissions and prove inferences from them, the log of the defendants is admissible, and the other side may contest

such inferences by putting in the logs of lighthouses in the neighbourhood of the collision. The inference in question here was the presence of other ships in the vicinity which could have rendered service to the injured vessel.

AS TO ADMISSIBILITY OF SHIPS' AND OTHER LOGS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 125, 126, para. 193; and FOR CASES, see DIGEST, Vol. 1, p. 179, Nos. 910-916.]

Cases referred to :

- (1) *The Woodarra* (1921), 38 T.L.R. 160; 22 Digest 318, 3115.
- (2) *The Buteshire*, [1909] P. 170; 1 Digest 179, 908.

ACTION to recover salvage remuneration for services rendered to the "Cornish Rose." The facts are sufficiently stated in the judgment.

H. G. Willmer for the plaintiffs.

E. W. Brightman for the defendants.

SIR BOYD MERRIMAN, P. : This case has been put before me with the maximum of agreement on both sides and in a very convenient and helpful way, and the fact that that is so relieves me of making any elaborate review of the facts.

On a dark and stormy December night the "Cornish Rose" was in considerable danger somewhere between 15 and 20 miles north-west of Pendean at a time when there was a strong north-westerly wind blowing and her engine room had completely broken down. She could neither steer herself nor, of course, could she steam at all, and she was shipping considerable quantities of water and was in danger at any time of a further breakdown of hatches and of becoming even more helpless. About all that there is no dispute, and although it may be possible to exaggerate the danger to her, nobody suggests that she was not in considerable danger. On the other hand, she was in a part of the seas where there were in fact other ships which could have rendered assistance to her, and one at least appears to have been ready and willing to do so in addition to the "Finland" which rendered the salvage services in this case. But in fact it was the "Finland" which rendered the services, and it was the "Finland" which brought the "Cornish Rose" into safety after some 22 hours of considerable hard work. In the course of that time one tow rope or another parted three times and to a large extent in one instance at any rate—if not in two instances—that was due to the condition of things on board the "Cornish Rose" and to their failure to take the necessary steps to make a connection in a seamanlike way. But, taking one thing with another, there is no doubt whatever that it was a laborious and rather dangerous and meritorious service. The agreed value of ship and cargo is £3,480, or call it in round figures £3,500. The "Finland" was a much more valuable ship, and she incurred certain expenses (rather less than £50) and a certain amount of loss of time. I think that, taking a broad view, and including the expenses which she incurred, if I award the sum of £1,000 in all for these

services, I shall not be far wrong. No apportionment is required, and therefore I make none as between the owners, master and crew. But, before parting with the case, I want to say one other thing.

This is a case in which a very full and careful pleading of the facts upon which the claim was based has been accepted by the defendants as an accurate statement of the facts, though, following the common form of pleading in these matters, the defendants have not accepted all the inferences from the facts as to the danger and value of the services and so forth which it is sought by the plaintiffs' statement of claim to draw from the facts which were admitted. In these circumstances the plaintiffs sought to put in the defendants' log in support not of any new allegation of fact but in support of the inferences which they desired to draw as to the nature of the services. There was no objection to the use of this log provided that on the other side any inferences from the absence of any mention of the possibility of help from other ships were counter-acted by corresponding entries from the logs of the *Lizard* and *Land's End* lighthouses. I have admitted these documents—the lighthouses' logs—they not having been objected to by the plaintiffs, and I think it is desirable to say a word about the matter as the question of practice is of some importance. I consider that it is very important to maintain the practice that when pleadings are framed in this way with the deliberate intention of narrowing the issue of controversy and of obviating the necessity of calling expensive witnesses—a practice which is very much to be desired—it is most important that no witnesses should be called either to prove the facts that are already admitted or to attempt to prove facts beyond those which have been pleaded and admitted—in other words, to give evidence of some new departure from the pleadings. But it must be remembered that on this form of pleading where the inferences of facts are contested there is still some contest on the pleadings themselves, and I think that it is impossible to exclude such a document as the defendants' own log if it is alleged that there is an entry in the log which tends to support inferences as to the nature of the services or the danger to the salved vessel, which inferences are disputed upon the pleadings. I think that that view is in accordance with the decision of the late HILL, J., in *The Woodarra* (1), to which my attention was called. I do not think that the decision conflicts in any way with the general practice which was accepted as being the practice in *The Bute-shire* (2), at p. 174. I think it is only necessary to add this: if it is desired in a proper case to use such a document as the defendants' log, it is desirable that notice should be given to the other side of the intention to tender the document in evidence, so that the other side may be prepared with any other admissible document directed to the same issue, namely, the proper inferences to be drawn from the admitted facts. In that way I cannot see that any real inconvenience would result from

admitting documents directed to the disputed issue, namely, the proper inferences from the facts which may be helpful in elucidating that particular matter of contest. In this case it was unnecessary to insist upon any formalities of that sort, because both sides were ready with the documents, and were ready to make the necessary admissions. But I think, as I say, in any case in which it is desired to depart from the accepted practice that the pleadings stand by themselves, and to call attention to another document which it is thought should be used, it is desirable that notice should be given in advance to the other side.

There will be judgment for the plaintiffs for £1,000 and costs.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the plaintiffs); *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the defendants).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

THE OWNERS OF S.S. "KING ORRY" v. THE OWNERS OF S.S. "ROCKABILL" AND THE MERSEY DOCKS AND HARBOUR BOARD (By original action).

THE OWNERS OF S.S. "ROCKABILL" v. THE MERSEY DOCKS AND HARBOUR BOARD (By counterclaim).
THE "ROCKABILL."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J., with Trinity Masters), May 13, 14, 15, 26, 1936.]

Shipping—Collision—Ship leaving dock—Order of dockmaster—Liability of dock authority.

The "Rockabill" was proceeding out of the Princes Half Tide Dock at Liverpool and the "King Orry" was proceeding from the Princes Landing Stage to her anchorage when a collision occurred. It was the duty of the officials of the Mersey Docks and Harbour Board to let the master of a ship leaving the dock know if the river was all clear north. They were not concerned with the southern area of the river as the master could see that better himself; but if it was seen that the master was going to create a risk of collision by going out, he should be ordered to bring his ship up in the gateway. The "Rockabill" was told the river was "all clear north," and no report was given to her as to the south. She was told to come ahead. The "King Orry" was in fact moving from the Princes Landing Stage at the time, i.e., was a danger to the south:—

HELD: (i) the officials of the Mersey Docks and Harbour Board were negligent in undocking the "Rockabill" in such circumstances.

(ii) as the "King Orry" was in no way negligent, it could recover against the Board.

(iii) as between the defendants, the "Rockabill" and the Board, the rule of the common law and not the rule of maritime law as embodied in the Maritime Conventions Act, 1911, s. 1, applied, and the "Rockabill" having been guilty of negligence, the loss lay where it fell and the owners could not recover from their co-tortfeasors, the Board.

[EDITORIAL NOTE.] The point here dealt with is the responsibility of a dock authority when undocking a ship. In the present case the duty of the dock master had been made the subject of a memorandum as it was impossible by reason of dock buildings for the master of the ship to see the river to the northward. The danger here, however, was a ship to the south, and as the dockmaster had told the master to come ahead while there was danger to the south, the authority was held to be liable.

AS TO OBEDIENCE TO THE ORDERS OF A DOCKMASTER, see HALSBURY, 1st Edn., Vol. 26, Shipping, p. 499, para. 724; and FOR CASES, see DIGEST, Vol. 41, pp. 971-973, Nos. 8619-8634.]

Case referred to :

(1) *The Sunlight*, [1904] P. 100; 41 Digest 971, 8624.

ACTION to recover damage for collision. The "Rockabill" was proceeding out of the Princes Half Tide Dock at Liverpool and the "King Orry," a passenger steamer plying between Liverpool and the Isle of Man, having discharged her passengers at the Princes Landing Stage, was proceeding to her anchorage in the Sloyne. The collision occurred about abreast of the North Island in the entrance to the Princes Half Tide Dock and a little inside the line of the outside of the Princes Landing Stage.

F. A. Sellers, K.C., and *H. I. Nelson* for the plaintiffs.

Lewis Noad, K.C., and *Robert E. Gething* for the first defendants, the owners of the "Rockabill."

R. K. Chappell, K.C., and *E. W. Brightman* for the second defendants, the Mersey Docks and Harbour Board.

BUCKNILL, J. : [His Lordship dealt with the facts and found the "Rockabill" alone to blame for the collision.] A more difficult question, as it seems to me, arises as to the legal position of the Mersey Docks and Harbour Board in this matter.

It was argued on behalf of the "Rockabill" that the dockmaster ordered the ship to come out into the river, and that her master was bound to obey such order by virtue of the provisions of the Mersey Dock Acts Consolidation Act, 1858, s. 49, which are set out in *The Sunlight* (1). It was said on their behalf that if the master carried out an order of the dockmaster which he was bound to obey, not only would the owners of the "Rockabill" be exempt from liability *in personam* for damage caused by the obedience of her crew to such an order, but also the "Rockabill" would be exempt from liability *in rem* for damage caused by the "Rockabill" through compliance with such an order. It is not necessary for me to consider the question of the liability of the "Rockabill" *in rem* in such a case for I am satisfied that no such order was given. The order to "come ahead" was not a preceptory order to go full speed ahead at once into the river and was not taken as such by her master.

The material facts, so far as the Mersey Docks and Harbour Board are concerned, in this case are shortly these. Mr. Bingham, the experienced dockmaster of the Waterloo system of docks, was in charge of the work of undocking the "Rockabill". He had to assist him, amongst others, a man called Stafford, also an experienced employee of the Board. In 1930 Bingham had issued certain instructions to his subordinates at this dock, and these instructions were, as I find, drawn to the attention of the master of the "Rockabill" and known by him. The instructions were also well known to Stafford. The instructions were as follows :

When vessels are in the river entrances, and about to enter the river, the officer in charge of the entrance should let the master know if the river is all clear *north* (as the official residence prevents those on board from seeing north), and if it is not clear, what is in the way, and its position. If asked about the southern area they should inform them that they can see south better themselves. They should not order a ship into the river unless absolutely necessary, leaving that to the discretion of the master, unless it is seen that the master is going to create a risk of collision by going out, when he should be ordered to bring his ship up in the gateway until such risk ceases to exist.

Bingham at the material times as I find was standing near the mushroom to which the bow rope of the "Rockabill" was fast. Stafford was standing with a megaphone on the north wall near the river end of the north entrance. Stafford in his evidence said that his duty, so far as Bingham was concerned, was to inform Bingham if anything was moving in the river when it was proposed to undock the "Rockabill," and more especially anything coming in from the sea on the north side of the river. Bingham said in his evidence that he expected Stafford to report anything on the move.

On this occasion Bingham blew his pea whistle, which is the customary signal to Stafford to make his report, when the "Rockabill" had squared up for the entrance. Stafford said that he then scanned the horizon including the Princes stage so far as he could see it and reported to Bingham by megaphone "All clear north." He said in evidence that at the time when he made that report he could see the masts and funnel of the "King Orry" and that she was stationary at the quay so far as he could observe. He said that when he reported "All clear north" that meant there was an element of danger south, and that in this case the element of danger was the "King Orry," although she was stationary. The conclusion I have come to is that if Stafford had been keeping a good look-out or had performed his duty properly, he would have seen that the "King Orry" was moving from the stage about the time when he made his report "All clear north," and would have reported that fact to Bingham. In fact, Stafford made no report at all about the "King Orry" to Bingham until very shortly before the collision, and at a time when a collision was, as I think, inevitable.

The question then arises whether this failure of Stafford to report the "King Orry" entitled the plaintiffs and defendants or either of them to recover their damages from the Mersey Docks and Harbour Board.

The position of the owners of the "King Orry" is not complicated by the question whether their servants were also guilty of negligence which contributed to the collision, for I have found as a fact that they were not negligent. One question which arises so far as the claim of the owners of the "King Orry" against the Mersey Docks and Harbour Board is concerned, is whether in the particular circumstances of the case, the employees of the Board owed a duty to the "King Orry" to take reasonable care not to allow the "Rockabill" to come out into the river from the dock at an improper time.

In my view Stafford and Bingham as employees of the Dock Board were in fact co-operating with the master of the "Rockabill" in bringing the "Rockabill" out of the dock into the river. This was an operation which, if done carelessly, was likely to cause risk of damage to a vessel navigating in the river close to the entrance of the dock at the time when the "Rockabill" emerged from the north entrance. As I have already said, I find that Bingham did say "come ahead with her" or "come ahead" to the "Rockabill's" master, and I have come to the conclusion that at the time when he said so and ordered the bow rope to be cast off, the "King Orry" was in fact moving away from the Princes stage and was not stationary as Bingham says she was. Bingham was probably misled by Stafford's failure to report the "King Orry" to him. As I have said, the evidence is clear that Stafford failed to report the "King Orry" until very shortly before the collision, and I think he failed to do so because he was keeping a bad look-out.

Owing to this failure of duty on the part of Stafford, and owing to the failure on the part of Bingham to notice the movement of the "King Orry" himself, or owing to the determination of Bingham to undock the "Rockabill" regardless of the manœuvres of the "King Orry," Bingham told the "Rockabill's" master to come ahead with her, and directed the bow rope to be cast off, and in compliance the "Rockabill" did come ahead. In doing this Bingham was, in my judgment, negligent in the performance of his part of the operation of undocking the "Rockabill" and his negligence contributed to the collision. On the other hand, the master of the "Rockabill" knew that he was expected to look out for vessels coming from the southward himself; and he knew of Bingham's instructions in 1930 and the practice in this dock, and he was not bound to obey the direction of the dockmaster to come ahead if he thought it more prudent to stay where he was. Neither did the direction to come ahead, in my view, relieve the master of the "Rockabill" from the duty of himself keeping a good look-out, nor did it require him to go at full speed ahead from the time when the order was received until the collision

or until it was inevitable. In the result I think that both the crew of the "Rockabill" and the employees of the Dock Board were negligent and that their negligence contributed to the collision and that through them their employers are both liable to the owners of the "King Orry" for the damage sustained by her in the collision that resulted from their negligence.

The last question is whether the owners of the "Rockabill" can recover their damages from the second defendants, the Mersey Docks and Harbour Board. In my judgment they cannot do so, for as between them and the Dock Board the rule of the common law and not the rule of the maritime law as embodied in the Maritime Conventions Act, 1911, s. 1, applies. The rule of the common law, as I understand it, is that in such a case as this, where the claimants have themselves been guilty of negligence contributing to their own damage, the loss lies where it falls, and they cannot recover from their co-tortfeasors.

I therefore give judgment for the plaintiffs against both the defendants, and I dismiss the counterclaim of the first defendants against the second defendants.

Solicitors : *Pritchard, Sons, Partington & Holland*, agents for *Batesons & Co.*, Liverpool (for the plaintiffs); *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the first defendants, the owners of the "Rockabill"); *Gregory, Rowcliff & Co.*, agents for *E. A. Moorhouse* (for the second defendants, the Mersey Docks and Harbour Board).

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

MAHADEO v. R.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Russell of Killowen, Sir Lancelot Sanderson, Sir George Lowndes, Sir Sidney Rowlatt),
April 30, May 1, June 11, 1936.]

*Privy Council—Fiji—Criminal Law—Manslaughter—Conviction of murder—
 Exclusion of statements—Corroboration.*

The appellant, a lad of 16, in separating two boys who were fighting, caused the death of one of them. The only witness was one Sukraj, who was present at the time and was charged as accessory after the fact. At the trial a letter was read from the solicitors acting for the defendants asking for the production of all statements made by the defendants and Sukraj. This was characterised as improper and production was refused. Also at the trial counsel for the defendants agreed that the medical aspect of the case should be argued by one counsel only, and it was agreed that this should be done by counsel for an accessory. This counsel was not allowed to deal with this subject, and was told to confine himself to the question whether his client was an accessory:—

HELD: (i) in the circumstances the killing only amounted to manslaughter, there being no presumption of malice.

(ii) the letter asking for production of the statements was quite a proper one and the statements should have been produced.

(iii) counsel for the accessory was quite entitled to argue whether there had been a murder or not, and this would be so even if the prisoner had pleaded guilty. He was, therefore, fully entitled to discuss the medical aspect of the case.

(iv) Sukraj being an accomplice, his evidence required corroboration. The fact that he kept silence as to the death of the boy was not corroboration.

[EDITORIAL NOTE.] There is an application here of the qualification of the doctrine of the presumption of malice given in *Woolmington v. Director of Public Prosecutions* (2), and applicable to cases of homicide. The restriction of speeches of counsel is another important matter here dealt with, and it is shown that counsel for an accomplice or accessory may argue that the crime was never committed, even though the prisoner has pleaded guilty. It was not necessary to go as far as that here. The counsel for the accessory here only desired to deal with the medical evidence for the prosecution.

AS TO MANSLAUGHTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 438-440, paras. 752-756; and FOR CASES, see DIGEST, Vol. 15, pp. 782, 783, Nos. 8385-8435.]

Cases referred to :

- (1) *R. v. Baskerville*, [1916] 2 K.B. 658; 14 Digest 463, 4934.
- (2) *Woolmington v. Public Prosecutions Director*, [1935] A.C. 462; Digest Supp.
- (3) *Re Dillet* (1887), 12 App. Cas. 459; 17 Digest 490, 542.

APPEAL by special leave in a criminal case from the Supreme Court of Fiji. The facts are fully stated in the judgment.

J. M. Pringle for the appellant.

Kenelm Preedy for the respondent.

The judgment of their Lordships was delivered by SIR SIDNEY ROWLATT.

SIR SIDNEY ROWLATT : This is an appeal *in forma pauperis* by special leave from the judgment of the Supreme Court of Fiji sitting at the Lautoka Circuit Court dated May 17, 1934, by which the appellant was found guilty of the murder of a boy named Ramautar, and being a young person within the meaning of the Fiji Ordinance No. 37 of 1932 was, pursuant to sect. 12, sentenced to be detained as the Governor might direct. The appellant is in fact about sixteen years old. Ramautar, the boy alleged to have been murdered, was about thirteen years old. Pursuant to Ordinance No. 6 of 1875 the trial was held before the Chief Justice of Fiji, who is the only judge in the Island, sitting with assessors, and by sect. 29 of the same Ordinance the decision was vested solely in the judge. By virtue of sect. 36 of Ordinance No. 4 of 1875 the trial, for all purposes material to the present appeal, fell to be governed by the English common law.

The materials before their Lordships on the hearing of the appeal consisted of the official note (not taking questions and answers verbatim), the judge's own somewhat abbreviated notes, a resumé of the remarks of the Chief Justice to the assessors at the close of the case, in the nature of a summing up, which resumé was handed by the then Chief Justice to the then Attorney-General after the institution of this appeal and brought before their Lordships as an exhibit to an affidavit by the Attorney-General for Fiji, and lastly a note of the summing up in longhand made by one of the counsel for the defence at the trial and exhibited to an affidavit by him. Certain incidents in the trial to which it will be necessary to refer appear from affidavits made by counsel for the defence and the then Attorney-General. In substance there is no conflict as to these incidents.

The case was tried upon information by the Attorney-General pursuant to the procedure in force in the colony, by which the appellant was charged with murder, and one Mathura his step-father and another boy, Sarandas, were charged, Sarandas with aiding and abetting and Mathura with being an accessory after the fact. In the result Sarandas was discharged at the close of the case for the prosecution and Mathura, like the appellant, was convicted. The history of the case can be stated comparatively briefly. The only evidence as to the actual homicide was given by one Sukraj, a labourer about twenty-five years of age. The effect of this was as follows : On the morning of Jan. 18, 1934, the appellant, the witness Sukraj, the dead boy Ramautar who was about thirteen years of age, and Sarandas, about the same age as Ramautar, namely thirteen years of age, were weeding in a field belonging to Mathura. A quarrel resulting in a struggle arose between Ramautar and Sarandas, who was the stronger boy. The appellant told Sukraj to separate them and on his refusal intervened himself. At this moment the deceased had hold of Sarandas's legs. The appellant released Sarandas

and caught Ramautar by the throat while he was on the ground. The witness and Sarandas were then cutting grass. The appellant called out in a short time and said, "Come and see what has happened to Ramautar." When the witness and Sarandas got up to him the deceased was quivering. That went on for three minutes, when he died. Sukraj then deposed that on the suggestion of the appellant they took the body and put it under a tree with the deceased's turban round his throat and leaving it there returned to Mathura's house. There was independent evidence that the four youths were working together in the field in question and the deceased's dead body was seen by independent witnesses under the tree. As regards what actually happened there is only the evidence of Sukraj. It appears that Sukraj arrived at Mathura's house before the other two and said nothing. The appellant, when he came, told the deceased's mother and her husband who apparently lived in Mathura's stable that Ramautar had hanged himself. Mathura was not then in. On his return he was told, according to Sukraj, everything. He then told the others to say nothing and went himself to Tavua Police Station some miles away from Tagi Tagi where these events happened and reported that a boy had taken his horses out to graze and had not returned. Subsequently Mathura, the appellant, and Sukraj removed the body from under the tree and hid it in broken ground in the bush. A search for the supposed lost boy was maintained in the neighbourhood till Jan. 24, that is for six days. Nothing more happened until Feb. 13 when Sarandas being at Tavua was sent for by a Mr. Powell who had apparently heard some rumours and in consequence of what he said took him to Mr. Probert the sub-inspector of police, where he repeated his statement which was taken down and put in evidence at the trial. This was to the effect that the deceased after the quarrel had left the others and that they had afterwards found him hanging dead. He also disclosed that Mathura had told him that they had since made away with the body.

In consequence of this, on Feb. 14, the police went to Tagi Tagi and saw the appellant under whose guidance they found some 36 human bones not including a head, which medical evidence given at the trial declared to be those of a person of either sex of about the deceased's age. The death of the person whose bones they were might according to the medical evidence have occurred at the time of the disappearance of Ramautar, the remains having been attacked by animals. Curiously enough there were also found at the same place a number of teeth, shown by expert evidence to be without question those of a person in middle life.

That evening the police took the appellant and Mathura to the Police Station and both made statements which were put in evidence. The appellant's statement concurred with Sarandas's previous statement that the deceased had left the others and that they had found him hanged.

He had described how he, Sukraj and his father had subsequently hidden the body in the bush. Mathura denied that he had been told that Ramautar was dead when he reported his alleged loss to the police and had joined in the search during the following days. On the next day Sarandas made another statement to the effect that it was Sukraj who had a quarrel with Ramautar but that the latter's actual death was caused by Mahadeo gripping him by the throat. This statement therefore corresponds with Sukraj's evidence, except that naturally Sukraj substituted Sarandas as the person who had the quarrel with the deceased. This statement was made after Sarandas was charged with being accessory after the fact.

Sukraj was then charged with being accessory after the fact and cautioned as the others had been. He then made a statement which was substantially in accordance with the evidence that he gave. On the previous day he had made a statement confirming the suicide story as up to that time put forward by the others. These statements were not admitted at the trial in circumstances to which it will be necessary to refer hereafter.

On the same day, Feb. 15, the appellant was charged with murder, apparently on the strength of statements of Sukraj, and after being cautioned made a statement in which he alleged that Ramautar had been killed by a stone thrown at him by Sarandas.

Some days after, namely, on Mar. 6, Sarandas being in custody asked to see the District Commissioner, before whom he made a further statement in all material respects so far as the appellant is concerned the same as his previous one. The appellant on that occasion declined to make a statement.

At the trial the prosecution was conducted by the Attorney-General, and Mathura and the appellant were separately defended. At the opening of the proceedings the Attorney-General stated that he had received a letter from the solicitors for the defendants requiring production of all statements made by the three accused and by Sukraj, other than those produced as exhibits in the proceedings. This letter was taken exception to by the Attorney-General as containing insinuations that the prosecution had suppressed documents. In point of fact the Attorney-General was not aware that there were two statements, namely, those by Sukraj, which had not been produced. The Chief Justice characterised the letter as being highly improper. In the result the statements of Sukraj were not produced but they were available on the hearing of this appeal before their Lordships. The refusal of these documents is the subject of the first comment which their Lordships feel bound to make upon the conduct of this trial. There is no question but that they ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production. It is

true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport.

Evidence having been given counsel addressed the court. Defending counsel had arranged between themselves that the counsel defending the appellant should leave to the counsel who appeared for Mathura that part of the defence which consisted in a criticism of the evidence of the death from a medical point of view. This arrangement was not known to the Chief Justice and when counsel for Mathura, counsel for the appellant having finished his address, was proceeding to deal with that part of the case, he was told by the Chief Justice that he must confine himself to the question of the implication of Mathura as accessory, the question as to the guilt of the appellant having already been exhausted by the address of the appellant's counsel. Unfortunately counsel did not then inform the Chief Justice of the arrangement or ask for an adjournment in order that the appellant's counsel might renew his speech on the subject omitted. In the result the court was never addressed on this part of the case on behalf of the appellant although counsel desired that it should be. The view of the Chief Justice was entirely ill-founded. Whether the deceased was murdered by the appellant was in issue as between each prisoner and the Crown, and Mathura's counsel would have been entitled to insist on proof of it and challenge the evidence of it even if the appellant had pleaded guilty.

After counsel had finished their addresses the Chief Justice addressed the assessors, apparently very shortly. He explained that he was not summing up to a jury but intimated that in a case of this kind corroboration was necessary but that he thought that there was corroboration, sufficient to support a conviction. He apparently considered that the circumstance that Sukraj, when he came back to Mathura's house before the others, had said nothing, was corroboration of his story in the witness box as to the manner in which the deceased came by his death, because his silence was due to a knowledge that the death was caused by the son of his master Mathura of whom he stood in fear. It is unnecessary to point out that this is no corroboration at all and in their Lordships' view there was absolutely no other corroboration.

It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it and further that evidence of one accomplice is not available as corroboration of another (*R. v. Baskerville* (1)). This rule as to corroboration, as was pointed out in the case just cited,

long a rule of practice, is now virtually a rule of law, and in a case like the present it is a rule of the greatest possible importance, the position being that there are three persons all implicated in a crime and one of them or two of them exculpates himself or themselves by fastening the guilt upon the other. In the present case, moreover, all the persons concerned had originally given false statements and belonged to a class of persons who are at the best not reliable witnesses.

In addition to the three comments which their Lordships have already felt bound to make on the conduct of this trial, there is a fourth, which is the most serious of all. The Attorney-General in his address, and the Chief Justice in his observations to the assessors, appear both of them to have treated this case as one of murder or nothing, on the footing that the homicide being proved malice was presumed. Upon the facts of this case as they appear from Sukraj's evidence, there is revealed affirmatively no more than a case of manslaughter. There is nothing to suggest that the appellant appreciated that he was applying a dangerous pressure to the throat of the deceased who was apparently a weakly boy. The view taken by the Chief Justice was based upon a statement of the law as to the presumption of malice long found in textbooks but recently explained and largely qualified by the decision of the House of Lords in *Woolmington's* case (2). But apart altogether from that case it never could be maintained that where the evidence for the prosecution points affirmatively no further than manslaughter the law would enlarge the proof and transform the case into one presumptively of murder.

Their Lordships have not overlooked the limits which the Board observes in dealing with criminal appeals. It is not necessary to repeat once more the rule set forth in *Re Dillet* (3), which has been recalled in several recent decisions. In the present case their Lordships are of opinion that there were really no materials here for a conviction for murder as opposed to manslaughter and in addition the trial was so conducted as in three separate respects, namely, the exclusion of the statements, restriction of the address by counsel, and the neglect of the rule requiring corroboration, to exhibit a neglect of fundamental rules of practice necessary for the due protection of prisoners and the safe administration of criminal justice.

In these circumstances their Lordships have humbly advised His Majesty that this appeal should be allowed and the conviction set aside.

Solicitors : *Barrow, Rogers & Nevill* (for the appellant) ; *Burchells* (for the respondent).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

TIBBALS v. PORT OF LONDON AUTHORITY.

[COURT OF APPEAL (Slesser and Romer, L.J.J., and Eve, J.), **June 16, 17, 1936.**]

Public Authorities—Superannuation—War bonus—Whether included in calculation of pension.

By a pension scheme which was taken over on its incorporation by the Port of London Authority, it was provided that deductions should be made from the wages paid to a certain employee and for the purpose of computing the pension payable to the employee the wages were to be deemed at the rate of the actual wages paid to him at the time of his retirement "exclusive of any gratuities, allowances for house, or other additions." From 1915 onwards the employee received, in addition to his wages certain bonus payments. The bonus payments were increased from time to time, and in 1918 a part of the bonus was consolidated with the wages. In 1919 a document was left with the employee, which stated "War bonus 15s. per week added to wage, counting for pension, plus 11s. 6d. per week floating war bonus." In the same year the employee in asking for a reconsideration of his wages, added "Present conditions of annual leave, sick pay, and pensions." No deduction was made from the bonus payments in respect of pension. In Mar., 1925, a further revision took place and in a circular the wages were described as "68s. 6d. per week as a maximum, non-pensionable floating bonus 12s." The employee then demanded that deductions should be made from the bonus payments. This was refused and the employee was informed that "the Authority are prepared to continue the payment of a non-pensionable bonus in addition to your wages in accordance with the terms of the circular, and by accepting that bonus you must be deemed to have agreed to the condition upon which it is granted." The employee did not accept the view of the Authority, but continued to work and to receive the bonus payments. Upon his retirement the employee claimed that in calculating his pension regard should be had to the bonus payments :—

HELD: (i) [ROMER, L.J., dissenting on this point] the words "exclusive of any gratuities, allowances for house, or other additions" did not exclude bonus payments from wages for the purpose of calculating the pension.

(ii) upon the evidence the bonus payments were at all times treated as non-pensionable and they should not be included in the wages for the purpose of calculating the pension.

[EDITORIAL NOTE.] This case would seem to be of importance outside the particular circumstances of the Port of London Authority's superannuation scheme. Though schemes for superannuation vary, it would seem that the question of including war bonus in the calculation of pension will be of general interest.

AS TO SUPERANNUATION, see HALSBURY, 1st Edn., Vol. 24, Revenue, pp. 748-753, paras. 1605-1620; and FOR CASES, see DIGEST, Vol. 39, pp. 307, 308, Nos. 836-841.]

Cases referred to :—

- (1) *Salford Union v. Dewhurst*, [1926] A.C. 619; 37 Digest 215, 105.
- (2) *Sutton v. A.-G.* (1923), 39 T.L.R. 294; 34 Digest 85, 629.
- (3) *Railway Clearing House v. Druce* (1926), 42 T.L.R. 663; 34 Digest 85, 630.
- (4) *James v. Tees Conservancy Comrs.* (Unreported).
- (5) *Adams v. Liverpool Corpn.* (1927), 137 L.T. 396; Digest Supp.

APPEAL from a decision of CROSSMAN, J., dismissing an action brought by the appellant, who was formerly in the employ of the respondent authority. The appellant was entitled to receive a superannuation allowance, and the question for decision was whether a war bonus which had been paid to him should be included in his wages in calculating the amount of the superannuation allowance. The appellant was formerly in the employ of the Surrey Commercial Dock Company and the undertaking of this company was transferred to the respondent authority under the provisions of the Port of London Act, 1908, s. 3. In Aug., 1903, while in the employ of the dock company, the appellant entered into an agreement, by deed, with the dock company and he claimed that, under the terms of that deed, the war bonus should be calculated in ascertaining the amount of pension he should receive.

J. M. Gover, K.C., and H. G. Garland for the appellant.

Gavin T. Simonds, K.C., Fergus D. Morton, K.C., and J. H. Stamp for the respondents.

Gover, K.C.: The war bonus is part of a man's salary or wages. It cannot be an addition in any ordinary sense of the word. It is no more an addition than an increase of wages under that name. The difficulty which has arisen is due to the fact that the term "war bonus" instead of increase of wages has been used. The case does not come within the clause of the deed "exclusive of any gratuities, allowances for house or other additions." "Other additions" must be read *ejusdem generis*. It cannot make any difference that owing to the conditions caused by the war, the addition is called war bonus. It was not given at the discretion of the employers any more than an increase of wages. Mr. Tibbals was an existing servant when the respondent authority took over the previously-existing undertaking and he was entitled to hold office as before, as provided by the Port of London Act, 1908, s. 60 (1). [He referred to *Salford Union v. Dewhurst* (1), *Sutton v. A.-G.* (2), *Railway Clearing House v. Druce* (3), *James v. Tees Conservancy Comrs.* (4), *Adams v. Liverpool Corpn.* (5).]

Garland, following on the same side: The only contract which would have to be defended would be a definite contract to vary the deed of 1903. The respondent authority must establish a case in the ordinary way and show that if the appellant continued in their employ, there was a contract that this deed should be varied by reading into it a provision that the appellant, instead of receiving a definite proportion of his salary or wages at the time of superannuation, should receive some lesser sum. The appellant was a transferred servant and entitled to remain on. The employers had taken a wrong view in regard to the position of the workpeople under the statute and under the deed. The most that could be said against Mr. Tibbals was that he had acquiesced in a wrong view, but that could not affect his rights.

Simonds, K.C.: The questions to be decided are: (i) the construction of the pension deed of 1903, and (ii) if the view put forward on behalf of the authority, and which the learned judge accepted, is wrong, whether in the circumstances of this case, Mr. Tibbals contracted out of whatever rights he had to have the war bonus included for computation of pension.

The pension deed of 1903 says: "For the purpose of computing the superannuation allowance in accordance with the prescribed scale, the salary or wages of the officer shall be deemed to be at the rate of the actual salary or wage paid to him at the time of his superannuation, exclusive of any gratuities, allowances for house or other additions." The question is whether the war bonus is an "addition" within the meaning of that clause. The deed provided that the calculation should be at the rate of the yearly salary or wage paid, "exclusive of any gratuities, allowances for house, or other additions." Why this disqualification? To exclude something which would, but for the exclusion, be covered by the principal words. That which is excluded is not only gratuities but something which in the broad sense of the words "salary or wages" is included therein. It cannot be suggested that where a man is given an allowance in lieu of a house, it is not wages. Therefore there is excluded from the wage, something which is normally part of it. There is an essential difference between a wage and a war bonus. An alteration in the wage would bring the contract of service to an end, but an alteration in the amount of the war bonus would not, because it is one of the terms of the contract that the war bonus may be altered. Since 1919, the war bonus had been paid on the footing that it was non-pensionable, and no deductions had been made from it. Whether it be a new contract or a varied contract, the appellant accepted the bonus from 1919 onwards on the basis the payment was made and he could not turn round in 1925 and say it should be included in the amount for pension.

Fergus Morton, K.C., following on the same side: The question is whether this particular type of payment comes within the actual yearly salary or wage, or within gratuities, allowances or other additions. In 1925, the authority stated, in a circular, that the non-pensionable floating bonus was variable from time to time as the authority might decide. It was not questioned in any part of the correspondence that it was variable from time to time by the authority at its discretion, and it was offered and paid upon those terms. There is something which marks off this bonus from the regular wages which a man receives. The bonus can be varied according to the circumstances of any particular month or year. Therefore on the construction of the deed, it would come within the words "or other addition" and not within wages. The bonus was paid to Mr. Tibbals on the footing that it was non-pensionable and he knew it.

SLESSER, L.J. : This is a case of considerable importance, because, although the particular case is brought by one employee of the Port of London Authority, yet in the result it may well be that a number of other persons employed by that authority will be affected. The problem which we have to consider arises in the following way. For many years it was the custom at the Surrey Commercial Dock Company that the employees of that dock company should work upon a system of wages and deductions from wages which would give to them on their retirement a pension—what is known as a superannuation scheme. In the year 1903 there was drawn up an agreement between many of the employees of the Surrey Commercial Dock Company and the Surrey Commercial Dock Company, setting out the terms on which that pension should accrue. We are told that there had been several earlier schemes, but we are not concerned with them. For the purposes of the present case, the matter begins with the contract of Aug. 7, 1903. Mr. Tibbals, who is the plaintiff in this case, entered the service of the Surrey Commercial Dock Company in 1889. He was a rafter in the floating timber department, and in 1903 he was appointed to the permanent staff of the company. He was a party to this agreement of Aug. 7, 1903. The agreement is expressed to be between the Surrey Commercial Dock Company and the several persons whose names, addresses and descriptions are set forth in the second schedule to the agreement, and amongst them is the name of Mr. Frank Henry Tibbals ; rank, rafter ; date of appointment, Apr., 1903. In 1908 there was constituted by the Port of London Act, 1908, a statutory authority called the Port of London Authority, which took over, among other bodies, the undertaking of the Surrey Commercial Dock Company. This is provided for in the Port of London Act, 1908, s. 3, and by sect. 60 (1) it is provided that the officers of the various companies are to hold office on the same terms and conditions as they had held them in the several dock companies, including all conditions regarding pension or other superannuation allowance, under the Port Authority, as they would have held them had they not been transferred. No question arises but that the Port of London Authority now stands in the same position as did the Surrey Commercial Dock Company. In the court below, it was sought to be said that the effect of this statute of 1908 was to place a statutory obligation upon the Port of London Authority to pay these pensions, apart altogether from the contract which they had taken over from the Surrey Commercial Dock Company, and that this case fell within the principle in the case of *Salford Union v. Dewhurst* (1), where it was decided, broadly speaking, that where there was a statutory obligation to pay a pension in the form of a superannuation allowance, neither the company nor the man could contract out of that statutory obligation. Mr. Gover has stated to us that he did not intend to argue that point here and he said that he abandoned it.

The learned judge had decided it against him in the court below. I express no opinion upon it. It seems to me that the Port of London Act, 1908, can do no more than carry over as, what Mr. Gover has called, a sort of statutory novation, the obligations of the Surrey Commercial Dock Company to the Port of London Authority.

So far the matter is clear. The difficulty in this case has arisen by reason of the fact that it became necessary or was agreed during the Great War to grant to the men certain wages of a peculiar kind called bonuses. It is not very easy exactly to say what connotation may be applied to the word "bonus" in this connection, and it may be used in different contracts of service in different ways. It may be that in certain cases it was no more than a gratuity. In other cases it may be that it was part of the consideration of service. But what Mr. Gover himself says is that whatever it may mean in general in this particular case, it has about it this quality, that, to quote the language used in one of the circulars, "unlike the ordinary wage, it is variable from time to time, as may be decided by the Authority." He says this bonus was granted, owing to the economic conditions produced by the war and that it was contemplated by both parties that at the termination of those economic conditions the ordinary wage, and the ordinary wage only, should continue, and that the bonus was fortuitous and fluctuating.

Then Mr. Tibbals, in company with other persons, received, at any rate from Feb. 22, 1915, onwards, in addition to his wages, certain bonus payments. We have been furnished with a list of the amounts of the bonus payments and of the wages. At the outset, at the date I mentioned, the wages were £1 18s. 0d. per week and the bonus payable was 3s. It continued to rise, going up to 6s., 12s. and 18s.; and then on May 6, 1918, being then altogether 22s. 6d., it was apparently divided, and 7s. 6d. of it remained bonus and the other 15s. became what is called consolidated, that is, taken over into an increase of wages, making a total weekly earning of £3 0s. 6d. in all. Again it continued to rise and it is not necessary here to state the increases which took place during this period. It went on until 1925, when both the bonus payable and the plaintiff's wages were from time to time varied, the plaintiff's wages reaching their peak on Mar. 22, 1919, when they were £3 5s. 0d., a sum at which they have remained ever since, and the bonus fluctuating, rising in 1921 to 30s. 6d., and subsequently descending to the present scale of 15s. 6d. I should have added, when I said that the wages remained the same, that it does appear that finally on Mar. 5, 1925, there was yet another change in these wages to £3 8s. 6d. and a bonus of 12s., making a total of £4 0s. 6d., which was the sum payable when the plaintiff retired in 1928.

The first specific information which we have of what was done with regard to this bonus and the differentiation, if any, made between it

and the wages is to be found in certain correspondence beginning in Mar., 1919. There are reasons in the evidence and in the correspondence to believe that the material act which was then done by the Port of London Authority in saying to Mr. Tibbals and the other men affected that the war bonus would not carry pension, dates back not from 1919, but in my view dates right back to the time when the war bonus was first given in 1915. The actual document in 1919 which was left with Mr. Tibbals and other of his co-workers states under the head "War bonus" that "15s. per week added to wage, counting for pension, plus 11s. 6d. per week floating war bonus." The reference to "15s. per week added to wage counting for pension," and the omission of those words from the phrase "floating war bonus," makes it clear, I think, that it was only the wage other than the floating war bonus which was to count for pensions. That was set out on Jan. 15, 1919, and on Mar. 15, 1919, Mr. Tibbals, among others, in asking for a reconsideration of their wages and quoting the figures £2 13s. 0d. plus 11s. 6d. war bonus per week, which was the sum mentioned as regards war bonus in the document to which I have referred, which was left with Mr. Tibbals, adds this: "Present conditions of annual leave, sick pay, and pensions." I read that to mean Mr. Tibbals and his colleagues were willing that the present condition of things as to pensions was to continue, and the present condition as to pensions was that it was not to be calculated with regard to the floating war bonus. There is a reference in the evidence—particularly in the evidence of Mr. Matthews—to the same effect. He states that that statement "plus 11s. 6d. per week floating war bonus" was a memorandum of an existing fact and that he always reminded the staff, in dealing with them, that the floating war bonus did not affect the pension. He said: "I did that on every occasion. It became a habit." We have to add to that the undisputed fact that whereas under the original contract of Aug. 7, 1903, there was provision for the deduction from the men's wages in clause 5 in respect of the pension which they were hereafter to receive, no deduction was ever made from 1915 onwards from the men's bonus in respect of pension, and everybody seems throughout to have treated the position as being that the bonus did not carry pension or affect the amount of pension, until we come to a certain incident in 1925, to which I shall have to refer. Up to that time there seems to have been no question but that the situation was as stated by the employers in their evidence and as stated by Mr. Tibbals himself in the document which he signed. In those circumstances the question has now arisen whether Mr. Tibbals who retired from the service of the employers on June 6, 1928, is entitled to a pension on the basis that at the time of his retirement his wages are to have included in them this bonus, or not. The actual terms on which he relies are those set out in the agreement of Aug. 7, 1903, and are to the following

effect: After stating that "the prescribed scale according to which the superannuation allowances shall be computed shall be as follows: . . . after thirty years' service eight-twelfths of the yearly amount of salary or wages"—and there is no question but that Mr. Tibbals has served his thirty years, and whatever be his salary or wages he is entitled to eight-twelfths of that amount as pension—it goes on in this way: "For the purpose of computing the superannuation allowance in accordance with the prescribed scale the salary or wages of the officer shall"—and then follows an immaterial exception—"be deemed to be at the rate of the actual salary or wages paid to him at the time of his superannuation or retirement, exclusive of any gratuities, allowances for house or other additions."

Now the first question which arises is whether those words are apt to exclude from the wages the bonuses. In my opinion they are not. I think that upon a proper construction of those words the bonus which was paid to Mr. Tibbals from time to time ought to be deemed to be part of his wages for the following reasons: the wages which are to be paid to him at the time of his superannuation or retirement are said to be exclusive of certain matters. Leaving out for the moment the question of what matters are excluded, I think there can be no doubt upon the authorities and upon a consideration of the facts of this case, that this bonus is included in the amount of "wages." Such I believe to be the effect of the various cases decided by the courts, beginning with the case of *Sutton v. Attorney-General* (2), where, to begin with, the EARL OF BIRKENHEAD points out at p. 297 that:

For good and sufficient reasons that part of pay [that is the bonus] which intended to remain permanently was distinguished from that part which was granted only for a period and was to cease when the need which occasioned it had disappeared; but it was none the less pay. He was entitled to be paid for the time being for his services the total amount of permanent pay and war bonuses. The term "bonus" may, of course, be properly used to describe payments made of grace and not as of right. But it nevertheless may also include, as here, payments made because legally due, but which the parties contemplate will not continue indefinitely.

That view of the EARL OF BIRKENHEAD was shared by VISCOUNT FINLAY and LORD ATKINSON, and in particular I would refer to the speech of VISCOUNT FINLAY, where, on p. 298, he quotes from ATKIN, L.J., as he then was, who had given the dissenting judgment which the House of Lords approved in the same case.

For these reasons it appears that "pay" covers the war bonus that was given to civil servants by reason no doubt of the abnormal conditions caused by the war. It is not an allowance. It is a wage. It appears to me that in the present case what happened was that there was an increase in the rate of pay and the reason for this increase is

immaterial. It is not suggested in the present case that this bonus was in the nature of a gratuitous payment. It was clearly a payment (possibly a temporary payment) paid as part of the contractual consideration for the service. It seems to me to fall within the observations of the majority of their Lordships in the case of *Sutton v. Attorney-General* (2). In the case of the *Railway Clearing House v. Druce* (3), the war bonus to the clerical staff was stated in terms, at p. 664, "not to be treated as salary and that no deduction is to be made therefrom for superannuation," and a distinction is made in that connection which seems to me not to apply in the present case, apart from the special arrangements which I shall have to discuss hereafter. Though it is said in the present case that the war bonus is not to count for pension, it is not said anywhere, as in *Druce's* case (3) that the war bonus is not to be treated as salary or wages. Therefore I think it is clear that if there were no exclusions of any other matters in this case, this war bonus would properly be treated as part of the salary or wages. Finally, I would refer in regard to this matter to the case of *James v. Tees Conservancy Commissioners* (4), which seems to me to follow in the same way.

I come, therefore, to the exclusion. Mr. Gavin Simonds has argued that one of the exclusions is sufficient to cover the case of a war bonus. The language is as follows: "exclusive of any gratuities, allowances for house or other additions." In my view, although it may be an exclusion of a salary or wage, it may also extend to matters which are not salary or wage; and that I derive from a contemplation of the word "gratuity," which may in certain circumstances be so connected with the wage in the form of a perquisite that it may be deemed to be an emolument, but similarly may be in the form of what is commonly called a "tip" which could not in any way be conceived to be part of the wage. Therefore, I think that the exclusion may be, or may not be, as the case is, an exclusion of something which would otherwise be part of the salary or wage. There follows "allowances for house." It appears from a list with which we have been furnished that, in the case of a number of workers who would be covered by this agreement, allowances are made, and payments (so to speak) may be made in kind, and not by wage, or as additions to the wage. The foreman of the rafters, for example, that being Mr. Tibbals' own occupation, gets an allowance of house and coals, and it is clear, therefore, that when this exclusion speaks of an "allowance for house," it has in contemplation such matters as are there stated, "dock master: house, clothes and coals," but it is not dealing with the house as such, but an allowance in lieu of house such as we find provided in the case of the inspector of general stores. Some people, like the foreman of rafters, get a house, but the case is really not dealt with in the agreement at all so far as regards the house in computing the wage. No doubt the problem might arise when instead

of getting the house, he gets an allowance for it, as to whether that should be deemed to be part of the wage, and it is here expressly said that it shall not. The difficulty of the case is accentuated when it is remembered that the house in itself is an emolument or remuneration equal to the allowance for the house, and all this shows, to my mind, how difficult it is to say that the exclusion is in any way limited to the wages as such or to any class of wages as such. Then follow the words which are the most difficult of all: "or other additions." It is said that this war bonus is an "other addition," and that by reason of the fact that it is of a variable or temporary nature, it is pointed out to us how the employers have told the workmen and made it a term of the contract, at any rate in 1925, that the war bonus should be variable. In my view that is not decisive of the matter. It may well be that money wages, which must admittedly be wages, are variable. They may vary by some arrangement of sliding scale, or facilities for negotiation provided under some scheme, but they would none the less clearly be wages. I think that the reference to which I have already called attention in the speech of the EARL OF BIRKENHEAD in the case of *Sutton v. Attorney-General* (2), that the permanence or impermanence of the wage is no test, really applies here. I can see no distinction in principle between a bonus and any other form of wage on the ground that one is more permanent than another. The test is, what was the actual yearly wage paid to the man at the time of his retirement. If it had in fact been made in part of bonus during that critical year, it seems to me that it was a part of the wage, just as much as any other part of the wage, and the mere fact that in one case the employer might vary it at his option without necessarily bringing the contract to an end, and in the other case the workman, by refusing to work when the wages were altered, could be said to be refusing to work without breaking his contract, does not seem to me to be an essential distinction. I think that the bonus, as was decided in *Sutton's* case (2) is part of the wages.

Then the question arises: what is the meaning of "other additions"? In my opinion, reading this matter as I do, and thinking primarily of the bonus as properly included in wages, what was intended probably was to exclude the allowance for house, allowances for other matters than house, such, for example, as an allowance for coals, which is one of the matters mentioned as being received by some persons affected by the contract, and allowances for special extra services which are peculiar to an individual, such as for weighing, for overtime work, or matters of that kind. I start from this basis: that this agreement, though affecting the several persons mentioned in the schedule, is collectively to apply to them all, though each in a sense makes a separate contract by being a separate person, and I think the additions point to some personal or individual consideration in a particular case, such as

a gratuity or an allowance for house or an addition for services under special conditions. I think that the bonus which is spread over the whole area affected by this agreement is a wage, and I think that *Sutton's* case (2) compels us to say that the mere fact that it is variable from time to time, does not make it any the less part of the wage or salary, whichever word is sought to be used. I think, therefore, that had there been nothing further than this agreement, this man would have been entitled to say that he should have his wages calculated on the basis that the bonus was part of his wage and that he would have been entitled to receive back his pay at the rate of £2 13s. 8d. per week, as sought in the declaration. But I do agree with the learned judge when he comes to the conclusion in the latter part of his judgment that the workman has not, as the employer contends alternatively in his defence, agreed to a variation of that agreement. It is clear to my mind that so long ago as 1919, if not earlier, this workman agreed to take a bonus on the basis, and on the basis only, that he should not claim pension upon it. The bonus, which was offered in 1915, was 11s. 6d. per week floating war bonus, not counting for pension. I am taking the converse of the part which was said to count for pension. Mr. Tibbals accepted that situation. From 1919 onwards, therefore, assuming for the moment that this agreement did in the words "actual yearly wages," include a bonus, he has agreed in terms that he will receive his bonus on the terms that such an interpretation shall not be put upon the original agreement.

So matters went on until 1925. On Mar. 5, 1925, a further revision of scale took place, as it had taken place many times before, and on that occasion, a new scale was set out and there the wages were described as "68s. 6d. per week as a maximum, non-pensionable floating bonus 12s." and as I have already said, there is a note, that the non-pensionable floating bonus is variable from time to time. Now in my view, although the language is not exactly the same as may be decided by the Authority, the description of this non-pensionable floating bonus is exactly similar, if not in words, at least in meaning, to the limitation which had been placed upon it in 1919, when it was said that the bonus should not carry pension. In my view, this variation of scale was doing no more than altering the amount of the bonus, as it had been altered from time to time, and the agreement which arose, either in 1919 or 1915, that the original agreement should be varied by excluding the bonus from wages was not affected by anything which was done on Mar. 5, 1925.

Nevertheless, at that time, this gentleman, his trade union, and his colleagues, took the view that there was sought to be imposed upon them at that time something new, some deprivation of right for the first time, and though they had not had deducted from their wages anything in reference to this pension so far as the bonus was concerned from 1919 onwards, yet suddenly they then, on advice, demanded that deductions

should be made from that part of their remuneration which was bonus. The employers refused to accept that position. A considerable amount of correspondence took place between the parties, but the final result of it was that the employers wrote to say, first, that "any deduction from your pay will be governed by the terms of that circular," and they returned the 6*d.* which Mr. Tibbals had sent. This was on Apr. 6, 1925. On Apr. 24, on Mr. Tibbals saying he could not agree with that view, on May 1, 1925, Mr. Toovey, the staff manager for the Port of London Authority said: "The authority are prepared to continue the payment of a non-pensionable bonus in addition to your wages in accordance with the terms of the circular, and by accepting that bonus you must be deemed to have agreed to the condition upon which it is granted." Then it is that Mr. Condon, the area trade group secretary of the Transport and General Workers' Union, of which Mr. Tibbals was a member, writes back, on May 4, on behalf of Mr. Tibbals and the others, that "they do not recognise any portion of the remuneration paid to them for their services being treated as non-pensionable," and they take up the position that they will not accept the view taken by the employers. Nevertheless, in fact, the men continued to work, and I find it impossible to come to the conclusion upon that material that the variation of the original agreement, as I think it was, in 1915 or 1919, was ever varied again in the direction sought by the workmen to say that it was, that is to say, to restore the bonus to the position that it should be regarded in calculating the pension.

Finally, however, I would just draw attention to the decision of the learned judge upon this point, because it is here that I find considerable support for the view which I have formed. The learned judge says that he finds as a fact that in Mar., 1919, Mr. Matthews, one of the defendants' officials, told the plaintiff that the war bonus did not count for pension; he finds that in March, June and July of 1919, the plaintiff wrote letters to the defendants' officials, in which he clearly recognised that the defendants took that view, and then he goes on:

I draw the inference that the plaintiff, who did not give evidence, knew at all material times that the war bonus was paid to him by the defendants on the footing that it did not count for pensions and that he never objected to this until the year 1925.

From that the learned judge goes on to draw the conclusion that the plaintiff did not accept the terms on which the defendants offered the war bonus, and so agree to treat it as non-pensionable. With every respect to the learned judge, on his own findings of fact it seems to me to be clear that the facts can only lead to one conclusion, and that is that Mr. Tibbals did treat the war bonus at all times as non-pensionable until 1925, when, as I say, what was then done seems to me not to have made any disturbance in the then contractual situation.

As I say, I therefore come to the conclusion, having regard to all the circumstances of this case, that Mr. Tibbals fails to satisfy me that he is entitled, in all the circumstances, to claim the war bonus as a part of his wages for the purpose of estimating the pension. I think that the amount which the defendants, the Port of London Authority, are paying him, or declare themselves ready to pay him, is the right amount, and therefore I think that this appeal fails and must be dismissed.

ROMER, L.J.: I agree that this appeal fails, but I should like to add my own reasons for so agreeing, partly because in one respect at any rate, I differ from the conclusion arrived at by the learned judge, and partly because my reasons for thinking that the appeal fails are not in all respects quite the same as those which have commended themselves to SLESSER, L.J.

As to the second point with which the Lord Justice has dealt, I find myself in complete accordance with his view. We do not know under what circumstances the bonus was payable up to the year 1919, that is to say, we do not know with any certainty what communications were made from time to time to the workmen to whom the bonuses were conceded; but we do know this, that whereas at the end of 1917 the bonus to rafters was 18s. per week, and the plaintiff's weekly wage as a rafter was £1 18s. per week, in the month of May, 1918, 15s. out of that 18s. was allocated to the plaintiff as a permanent wage, thus reducing the bonus, properly so-called, to 3s. At the same time the bonus was increased by 4s. 6d. to 7s. 6d., so that as from that time the plaintiff's wage, strictly so-called, was £2 13s., and the bonus payable to him was 7s. 6d. per week. That bonus was again increased in Nov., 1918, to 11s. 6d.

Now that was the position of affairs when, in 1919, negotiations began between the rafters, partly represented, I think, by the plaintiff himself, and the officials of the Port of London Authority, with a view to an increase in the terms of pay; and for the purpose of those negotiations, as I read the evidence, Mr. Matthews prepared a memorandum. Upon that document he had set down as the terms on which the rafters were then being employed, the following statement: "war bonus 15s. per week added to wage counting for pension, plus 11s. 6d. per week floating war bonus." It is reasonably apparent from that memorandum, which Mr. Matthews says was in fact shown to the plaintiff in this action, that the 11s. 6d. war bonus was not to be taken into consideration for the purposes of pension, but the 15s. which had been added to the permanent wage was to be taken into consideration for that purpose; and Mr. Matthews says in his evidence that on that, and, indeed, on every occasion when he discussed this question of bonus with the rafters, he always reminded them that the floating war bonus, as he called it in

the memorandum and in his evidence, did not rank for pension. Indeed, there is no doubt that the plaintiff became fully aware at that time of the fact that the bonuses were being paid on the terms that they were not to be taken into account for the purpose of calculating pensions.

Following upon the consideration of that memorandum, and the interview with Mr. Matthews, an offer was made on Mar. 15, 1919, in a letter suggesting as has already been pointed out by SLESSER, L.J., that there should be an alteration in wages, and so forth, which states: "Present conditions of annual leave, sick pay and pensions." Following upon that, further negotiations took place, with the result that the wages were increased from £2 13s. to £3 5s., the bonus for the time being, the floating bonus, remaining unchanged. That was the state of affairs from that time down to Mar., 1925, and it appears to me to be plain that during the whole of that time the plaintiff was serving the Port of London Authority on the terms that whatever might be the terms of the deed of covenant which I will refer to presently, the bonus was not to be taken into consideration for the purposes of pension.

We so come to March and April of 1925. At that time the Port of London Authority sent out a circular and posted up a notice in the works addressed to their employees, stating a change in the rate of wage, and also a change, so far as the rafters at any rate were concerned, in the rate of bonus. That document, that notice, made it abundantly plain that the bonus was not to be taken into consideration for the purposes of pension; it was referred to as "the non-pensionable floating bonus." Now objection, I agree, was taken to that circular by and on behalf of the plaintiff. He objected to the bonus being non-pensionable, and insisted that the bonus should be paid to him on the terms that it was pensionable, and that there should be proper deductions from it when it was paid weekly.

It may be a difficult question whether in the case of an employee like the plaintiff, who is paid a weekly wage, when his wage is altered he enters into a new contract of service altogether, or whether he continues upon the terms of the old contract of service except in so far as those terms are then altered. Let me assume that the latter is the true view. As from Apr. 1, 1925, a new wage and a new bonus was paid to the plaintiff. That was the only term of his employment that the Port of London Authority desired to change, because, as I have already pointed out, under his existing contract of employment the bonus was non-pensionable. The plaintiff disagreed that the new bonus should be non-pensionable, and wished his old contract of employment to be further varied by varying the provision about the pensionability (if I may use that expression) of the bonus. But it is quite plain that the parties were never *ad idem* upon that point, and therefore the plaintiff continuing his employment and receiving his additional wage, it must

be taken that that variation of the existing agreement was never made. That being so, he continued to serve upon the terms of the old contract of employment, unaltered in that particular respect.

But now let me suppose that upon a change of wage a new contract of employment altogether is entered into. The Authority offer to the plaintiff to employ him upon the terms set out in that circular or notice. The plaintiff entered into that employment as from that time under his new contract of service, and received the bonus. But not only had the Port of London Authority stated in the circular that the bonus was not pensionable, but they caused a letter to be written to the plaintiff pointing out in clear terms that if he received the bonus it would be on the terms that it was not pensionable. That letter is dated May 1, 1925, and the statement in the letter was this :

The Authority are prepared to continue the payment of a non-pensionable bonus in addition to your wages in accordance with the terms of the circular referred to above, and by accepting that bonus you must be deemed to have agreed to the condition on which it is granted.

The plaintiff could have refused to accept the bonus ; he need not have accepted the contract of service at all, but he did accept the bonus and he did re-enter the service of the authority, and it appears to me to be idle for him, in those circumstances, to say that he did not accept the bonus and did not enter into a new contract of service on the terms that the bonus was non-pensionable. With great respect to CROSSMAN, J., I am unable to agree with him upon that point.

As regards the other point, the one which was dealt with by SLESSER, L.J., first, I confess that I feel some difficulty. The authorities to which we have been referred, I find of no assistance in this case, because this case turns entirely upon the words of exclusion to which SLESSER, L.J., has referred, and they are not to be found in any of the authorities. The words of exclusion I will not read again ; I merely point out this, that they are not merely inserted *ad majorem cautelam*, that is to say, for the purpose of making it clear that something is not included in the wages and salaries which is not in strictness a wage or a salary. Gratuities, I agree, could in no circumstances form part of a man's wage or his salary, strictly so-called, but the exclusion included "allowances for house." Now if a man is paid, in addition to his ordinary or normal wage, an additional sum weekly in lieu of his being provided with a house, that additional sum I should have thought without any question whatsoever would form part of his wage or his salary. It is, however, to be excluded for the purposes of this pension scheme from his wage or salary. But it is plain from these words of exclusion that an allowance in lieu of a house is treated as being an addition within the meaning of the clause because of the words "or other

additions," and, therefore, inasmuch as this is called an addition, it is essential to find out to what a payment in lieu of a house is an addition. It seems to me that it is an addition to the man's normal wage, and differs from the rest of his wage in this respect, that it may cease to be payable at any moment instead of being paid during the whole term of his service, for if at any time he be provided with a house, the allowance would cease; so, too, in the case of an allowance for coal; at any moment he may be allowed coal, and his allowance for coal would therefore cease. It appears to me that it differs from the rest of his salary in that.

Now it is said that it also differs from the rest of his salary in the sense that it is a payment made to him for personal reasons. I confess that I have difficulty in following that. It is no more and no less a personal payment than is the rest of his wage. There were presumably some posts under the Surrey Commercial Docks which carried with them a free residence, and the allowance in lieu of a house would no doubt be paid when and so long as for some reason or another no residence was for the time being available. It appears to me that it is really an addition to what one may call the regular wage, that is to say, the wage which the parties consider will be a recurrent wage during the period of service. Now what other additions can one think of? Plainly, an extra payment for overtime would be an addition. I do not think that that is disputed, but that is not personal to the particular man; it is paid to everybody, I suppose, who works overtime. So, too, an allowance for weighing; that is not personal to the particular employee, but it would be paid, I imagine, to every employee who did weighing; but it is a payment of a non-recurrent nature, that is to say, it is not necessarily a recurring payment, as is the normal wage.

There would be a very good reason for excluding all such additions from the wage for the purpose of calculating a man's pension. For it would obviously be undesirable that the amount of a man's pension should depend upon the fortuitous circumstance that during his last week of employment he should have been in receipt of a payment that he might not have received had he left the employment one week earlier or one week later. Suppose that his men in the same grade of employment retire at the same time. One may have worked overtime during the last week of employment, the other not. One may have received an allowance for coal during the last week, the other may have received coal, and therefore no allowance. It would obviously be unfair that the former should receive a larger pension than the latter, when during the preceding week the positions may have been reversed.

Now let me come to the bonus. As I understand it, this bonus was an addition to the regular normal wage that was being then earned by the workman, for the purpose of meeting a state of affairs which at

that time no one thought was likely to be permanent. It was a state of affairs which the parties then thought, I think, was not likely to be a recurring thing or a lasting thing. It might cease at any time. In that respect it appears to me that the bonus does approach very nearly to an allowance for a house, an allowance for overtime, or an allowance for weighing. CROSSMAN, J., came to the conclusion that a bonus was one of the "other additions" referred to in these words of exclusion, and I confess, giving the matter the best consideration that I can, that I do not see my way to differ from him in that respect; but, of course, the matter is immaterial for the purposes of the present appeal, which fails in any case on the other ground.

EVE, J.: I agree with the conclusions at which the other members of the court have arrived, and I have nothing to add to what they have said. I agree with the view of the President of the court upon the second point.

Appeal dismissed with costs. Leave to appeal given.

Solicitors: *Pattinson & Brewer* (for the appellant); *Solicitor to the Port of London Authority* (for the respondent).

Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.

*Applied. KAYE v. LEVINSON. [1950]
E.R. 594.*

*Applied. REISS v. WOOLF. [1952]
2 All E.R. 3, and C.A. [1952]
E.R. 112.*

ABALIAN AND ANOTHER v. INNOCES.

[COURT OF APPEAL (Greene and Scott, L.JJ.), June 22, 1936.]

Practice—Order dismissing action unless fixed for trial within six years from "date of alleged loss"—Order inoperative as uncertain.

A firm of merchants insured goods against loss between Constantinople and London, warehouse to warehouse. The goods did not arrive and they claimed under the policy, alleging non-delivery and total loss, but not specifying a date of loss. The writ was issued in Oct., 1930, but the plaintiffs did not ask for a date for trial until late in 1932. Thereafter they requested further adjournments, and in Apr., 1933, the judge in chambers made an order adjourning the trial generally and ordering that if the action was not fixed for trial within six years from the date of the alleged loss the action stand dismissed. In Apr., 1936, the plaintiffs applied again for a date for trial and another judge gave a date in Oct., 1936. The defendants appealed on the ground that, as the action had not been fixed for trial within six years from the latest date on which the loss could have occurred—May 14, 1930—it stood dismissed:—

HELD: (i) an interlocutory order dismissing an action must be absolutely precise in its terms.

(ii) the date with reference to which the dismissal of the action is to be determined—in this case the "date of the alleged loss"—must be a definite date and not a period.

(iii) "the date of the alleged loss" must be a date which is to be found in the pleadings.

(iv) the court would not try an issue of fact or of law to ascertain the date in question.

(v) the order fixed no ascertainable date and was inoperative to effect a dismissal of the action.

[EDITORIAL NOTE. In this case an order which was probably thought at the time to be of little importance, has been the occasion of formulating important principles for the drafting of interlocutory orders dismissing an action. The first is that such an order must be precise in its terms so that the parties can know definitely whether it has operated to terminate the proceedings. The date when the action will stand dismissed must be capable of ascertainment by reference to a definite date or not by reference to a period, and lastly the definite date must be calculated by reference to a date given in the pleadings and not one referred to in affidavits or correspondence.

AS TO ORDERS DISMISSING ACTIONS FOR WANT OF PROSECUTION, see HALSBURY, *Hailsham Edn.*, Vol. 19, p. 222, para. 521, and FOR CASES, see *DIGEST*, Practice, pp. 547, 548, Nos. 2083-2093.]

APPEAL by the defendant against an order made by GODDARD, J., in chambers, fixing the date of Oct. 12, 1936, for the trial of the action.

The plaintiffs were assured by the defendant, a Lloyd's underwriter, against the loss of a bale of carpets consigned by them from Constantinople to London. The bale was shipped on Apr. 16, 1930, by s.s. "Lotus" and should have been carried on from Marseilles by s.s. "Matiana," which arrived in London on May 8 and cleared on May 14, 1930. A bale was delivered which bore a different number and contained only old sacks, and the plaintiffs claimed under the policy, alleging total loss. The policy covered loss caused by non-delivery and included the "warehouse to warehouse" clause of the Institute Cargo Clauses, by which the risks attach from the time the goods leave the shipper's warehouse until they are safely deposited in the consignee's warehouse, including transshipment. The plaintiffs' claim as set out in their points of claim was that:

The said goods . . . have not been delivered and have been totally lost.

The defendant denied liability and alleged fraud. The plaintiffs issued their writ on Oct. 28, 1930, and on Dec. 6, 1932, an order was made fixing the date of trial as Mar. 27, 1933. This date was later postponed till Apr. 26, 1933. Shortly before that date the plaintiffs applied for a further postponement on the ground that Mr. Abalian had to remain in Turkey to attend criminal proceedings arising out of the same facts. The defendants opposed the application on the ground that they had been put to expense bringing witnesses from abroad. BRANSON, J., who heard the application in chambers, on Apr. 12, 1933, made an order embodying the following terms:

It is ordered that if within twenty-one days the plaintiffs bring into court the sum of £1,000 as security for the defendant's costs of this action the trial of this action which is at present fixed for Apr. 26, 1933, be adjourned generally, with

liberty to either party at any time to apply for a date for trial on evidence that A. Abalian is able to attend. . . .

And it is further ordered that if the above-mentioned sum of £1,000 be not paid into court within twenty-one days or the action is not fixed for trial within six years from the date of the alleged loss this action do stand dismissed with costs to be taxed and paid by the plaintiffs to the defendant.

The plaintiffs applied in Apr., 1936, to the court to fix a date for trial, and their application was finally heard by GODDARD, J., in chambers on May 29, when the learned judge ordered that the trial be fixed for Oct. 12, 1936, subject to the Court of Appeal thinking that an earlier date should be given if they hold that the action did not stand dismissed; and gave leave to appeal.

The defendant appealed on the ground that, at the time GODDARD, J., fixed a date, the action already stood dismissed by the order of BRANSON, J., dated Apr. 12, 1933.

F. van den Berg, K.C., and *John Whyatt* for the appellants.

H. U. Willink, K.C., for the respondent.

van den Berg, K.C.: This action stands dismissed because it has not been brought within the requisite period. The alleged loss must have taken place before May 14, 1930, at latest, and that is more than six years from May 29, 1936, when GODDARD, J., fixed the date. The date of the alleged loss is the effective date on which the plaintiff says he lost the goods—the date from which the Statute of Limitations begins to run against him. It is the date which the court would expect to find in the points of claim as part of the plaintiffs' case, as showing that the loss took place within the terms of the policy. No date is specified in the pleadings, but even if the maximum latitude is allowed the loss took place abroad. The date of delivery contemplated was a reasonable time after discharge, and cause of action would arise on failure to deliver within such a time. It is not necessary to show a particular date; a period is sufficient. The plaintiffs allege in various letters and affidavits that the loss took place before Apr. 25, 1930. The court should make its decision upon the plaintiffs' case as put forward by these documents, but the points of claim by themselves are sufficient.

Willink, K.C.: The order was inadvertent. No precise date could ever be alleged for the loss. The plaintiffs' pleadings necessarily follow the form of the policy. The plaintiffs have to prove that the goods were shipped, and that they were not delivered by a date too reasonably long after the normal time for delivery to allow for mislaying. They cannot and need not allege dates. In such a serious matter the order is neither apt nor fitting to bar the plaintiffs' right to a trial. Under the Statute of Limitations the writ could have been issued at any time until Apr. 15 at the earliest. This court cannot be asked to try, on an interlocutory application, a difficult question of fact: namely, when the loss

occurred. The order is also ambiguous: it may mean that before an unspecified date the trial must begin, or judgment must be delivered, or an application must be made to fix the date for trial.

van den Berg, K.C., in reply.

GREENE, L.J.: This is an appeal from an order of GODDARD, J., fixing the date of Oct. 12, 1936, as the date for the trial of the action. At the back of that order lies a matter of greater importance than would appear. The action is an action against a Lloyd's underwriter on a policy of insurance dated Apr. 25, 1930, whereby the plaintiffs were given an insurance in respect of a bale of carpets which they were sending from Constantinople to London. The policy covers, among other things, non-delivery, and contains the "warehouse to warehouse" clause under the Institute Cargo Clauses. The writ in the action was issued on Oct. 28, 1930, and the statement of claim was delivered on May 29, 1931, and, as amended, on July 29, 1932. The original statement of claim alleged that the goods were loaded at Constantinople upon the vessel by which they were to be carried, but have not been delivered and have been totally lost. The amendment of the statement of claim introduced an alternative allegation referring to the "warehouse to warehouse" clause, and ended up by saying "the said goods have been totally lost."

The action did not proceed very rapidly, and on Dec. 6, 1932, an order was made fixing Mar. 27, 1933, as the date for the trial. On Mar. 9, 1933, a further order was made postponing the date of the trial until Apr. 26, 1933, and the order contained these words:

On condition that no further adjournment is to be allowed save upon very strong grounds and the strictest possible proof.

Shortly before the date fixed by that order the plaintiffs made an application to have the date of the trial further postponed. It is unnecessary to go into the reasons for that application, except to say that it was concerned with the detention in Constantinople of one or more witnesses who were required by the plaintiffs and whose presence in Constantinople the Turkish authorities required in view of some proceedings there. On that application an order was made by BRANSON, J., on Apr. 12, 1933, and it is in consequence of that order that the present question arises. The order is a very unusual one. It contains this provision: that the action is to stand dismissed unless a sum of a thousand pounds be paid into court—there is nothing unusual about that—but then it says this: or the action is not fixed for trial within six years from the date of the alleged loss.

The order, therefore, upon its face is an anticipatory dismissal of the action, and means that, unless within the period mentioned a certain event has happened, the action dies.

Speaking for myself, I think that any order dealing with the dismissal of an action unless something is done should be absolutely and perfectly precise in its terms. The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice. If an order is to be made in the form that, unless one party or another party does something, the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language, so that it may be possible for the party on whom the necessity of doing the act lies—which would normally be the plaintiff—to be in no doubt whatsoever as to the steps which he is to take if he is to avoid his action being dismissed. Looking at it in another way: where the defendant, in reliance on such order, goes to the court and asks it to say that, as a result of the order, the action stands dismissed and is no longer existent, he must be able to show first of all, that the language of the order is sufficiently precise, and, secondly, that the facts which the order contemplates have occurred.

In the present case the order is left in a manner which leaves me in complete doubt as to what was intended. I say that in no spirit of criticism, for this reason: that, as the period which was being named was a period of six years, probably the counsel for the parties and the learned judge did not have their minds directed to the possibility or the likelihood that the date from which the six years were to be calculated would ever have any materiality at all. It was not like something that had to be done in a fortnight or three weeks. I have no doubt that the parties thought that in six years the action would probably have been heard and done with. Therefore it would appear that the attention of nobody was really called to the fact that the language in the order was language of the very greatest obscurity. It says this:

And it is further ordered that if the action is not fixed for trial within six years from the date of the alleged loss. . . .

That, to begin with, introduces an element of obscurity into the order which I find impossible to resolve. Does it mean that the action is to be tried within the period? Does it mean that an application for fixing the date of trial is to be made within the period? Does it mean that the order on such an application is to be made within the period; or does it mean that the date which is fixed by such an order is to fall within the period? I find it impossible to say what that part of the order means.

But that is not so directly relevant to the present question as the construction of the latter part of the order, which is to this effect: "within six years from the date of the alleged loss." One thing is quite certain: that when the learned judge made this order it was not in

his contemplation that that date was likely to be or could properly be made a matter of controversy on some subsequent interlocutory application at which one party would be saying that the action stood dismissed and the other party would be denying it. I am quite sure that the learned judge never intended to place upon a court which had to deal with such an application the obligation of deciding what might very well have turned out to be an acute controversy of fact. Mr. van den Berg says that the date of the alleged loss can be ascertained in this sense: that he is able to place a date, namely, May 14, 1930, as the latest date on which the loss can have occurred; and in order to fix that date he relies, not on the pleadings, where the plaintiffs' case is to be found with certitude, but on certain documents and passages in affidavits which, he says, tie the plaintiffs down to that allegation. With regard to that, I should like to make two observations. The first observation is that the order on its true construction does not, in my opinion, permit of the taking of a date not later than which the loss is alleged to have taken place. It is incumbent upon the defendant relying upon this order to put his finger on the actual date from which the period runs. That, on Mr. van den Berg's argument, he is unable to do, because all he can do is to give a date not later than which, according to the case of the plaintiffs as collected from these documents, the loss can or must have taken place.

For my part I think that the intention was to refer, not to allegations in affidavits or correspondence, but to allegations which would be binding upon the plaintiffs at the trial. That would mean that the date of the alleged loss must be a date to be found in the pleadings. And when I look at the pleadings, no date is specified, and I cannot help thinking that when the order was made, that circumstance was not present to the minds of the parties nor to that of the learned judge; and the reason is, as I have said—and I attach no blame to anybody—that nobody was regarding the possibility of difficulties arising from that circumstance. However it may be, one thing is quite clear: that on the face of the pleadings no date is given, and I for one am not prepared to investigate correspondence and affidavits in which it is said that the plaintiffs tie themselves down to some definite proposition. It seems to me that the word "alleged" in the order could not in any case be confined to that, but would cover, for instance, the allegation as to the date which counsel puts before the court after considering the facts and the law.

Not merely is it impossible, to my mind, to fix on a specific date for the purpose of those words—for the reason which I have given, that even if May 14 were taken as a last date, it is impossible to fix on a date before as the date of the alleged loss—but there is a further difficulty: that the claim arises under the word "non-delivery" read in conjunction with the "warehouse to warehouse" clause. It seems to me impossible

so to construe this order as to impose upon the court at this stage the obligation of deciding when, under such a clause in such a policy, the loss is to be taken to have occurred. Mr. Willink says that the loss must be taken to have occurred at some date not necessarily upon or immediately after the time within which the goods, if they be carried by the transshipping vessel, the "Matiana," would normally have arrived at the warehouse, but possibly at the expiration of some reasonable time after that, in order that the parties may do what apparently the plaintiffs were doing—or at any rate not objecting to be done in this case—namely, investigating to see if the goods had been mislaid. It appears to me quite impossible for this court, on an order of this kind, to say that an action should be dismissed after hearing these questions of fact or of law, or of both, thrashed out on an application of this kind. I read the order as providing for no such thing, and in the events which have happened and on the facts as they are, as they appear on the pleadings, it appears to me to be impossible to find any definite date as from which the six-year period mentioned in the order is to work. That is the opinion of GODDARD, J., who on the notice of application under the summons for directions endorsed his note as to his reasons as follows :

I am of opinion that the second direction in para. 3 of the order of Apr. 12, 1933, has not effected a dismissal of the action as it is impossible to decide without a trial what was the date of the alleged loss.

I entirely agree with the view taken by the learned judge, and in my opinion the contention of the appellants fails.

SCOTT, L.J. : I agree, and only add a few observations on the case because of its general importance. I very much agree with what my Lord has said as to the importance, wherever an action is ordered to be dismissed without a trial, of the order so made being absolutely precise and unambiguous. This order was, in my view, neither the one nor the other. I agree with GODDARD, J., that it does not fix the date sufficiently to make it possible for this court on an interlocutory motion of this kind to say that the order clearly indicates a date which would be transgressed by taking the date of trial which has now been fixed. Under the policy one has to bear in mind first, as my Lord said, that the so-called peril insured against, that of non-delivery, is a peculiarly vague expression. For practical purposes, by the clause that was inserted in the policy, the policy is brought somewhere near to an all-risk policy. That means, in effect, that if for any cause the goods insured are, in the event, not forthcoming, that would be a loss under the policy. In order to see how one is to interpret that gloss that I have ventured to put upon it, one must look at the "warehouse to warehouse" clause. [His Lordship read the clause, and continued]: Under the policy, when the goods in question, assuming that they ever reached

Marseilles, were taken out of the vessel at Marseilles, they might quite easily have been shut out from the next on-carrying vessel, and possibly even from two on-carrying vessels one after the other; and the period of the transit covered by the policy would have been extended. It is impossible to say when that bale ought to have arrived in London, because there are a series of dates, any of which might, in the event, have been the date to be regarded as the date of termination of the assured transit. That sort of consideration cannot have been present, I think, to the mind of BRANSON, J., when he used the phrase that he has incorporated in the third paragraph of this order. I suspect that the reason is that already given by my Lord, namely, that in Apr., 1933, which is two years and a half after the commencement of the action and more than three years from the present day, the parties thought that six years from anything was quite long enough, and they did not much mind what was put in. I suspect that the phrase which appears in para. 3 was a boil-down of suggestions of counsel on each side without any attention really being given to the precise wording, and that that is the reason why it appears in this form. In the result, although a strong case up to a point has been made by Mr. van den Berg, for saying that the words could be construed as referring to the latest date alleged in the pleadings, I cannot think that it is really sufficiently clear to be capable of enforcement by this court for the purpose of wholly depriving the plaintiffs of their means of redress. I am alive to the fact that fraud is pleaded—fraud of a very grave kind—as an answer by the defendant underwriter, but this court cannot pre-judge that issue here and now. We must presume that the assured are innocent of all fraud until the case has been proved against them, and we must do justice here on the footing that it is an honest claim and that it has been delayed by various reasons, and that therefore, unless the order made by BRANSON, J., is one from which we cannot escape, it would be wrong to deprive the assured of their right to have their case tried. In my view the order is not sufficiently definite in its meaning to justify us in taking that very strong course.

Willink, K.C.: Do your Lordships hold that the words were inoperative, or that at the present stage enough had not been shown to make them operative?

GREENE, L.J.: The view which we both take is that the paragraph is inoperative, because it is too vague in the sense that it fixes no ascertainable date.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *William A. Crump & Son* (for the respondents).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

GEORGE TROLLOPE & SONS v. CAPLAN.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), April 29, May 28, 1936.]

Agency—Commission—Estate agents—Introduction of willing purchaser—Withdrawal by vendor without reasonable cause—Damages in lieu of commission—Matters to be considered in assessing damages.

Estate agents were instructed to find a purchaser for certain property part of which consisted of a shop let for £180 per annum. Willing purchasers were introduced and the price was agreed. The vendor then informed the agents that he had arranged with the tenant that the rent of the shop should temporarily be £145 per annum and that he was unwilling to go back on this arrangement, and he withdrew the authority which he had given to the agents to sell the property as a property earning as to part £180 per annum. The intending purchasers refused in the circumstances to proceed at the price agreed, the vendor declined to take less and negotiations were discontinued. In an action by the agents, *inter alia*, for damages for breach of contract the county court judge held that: (a) the negotiations came to an end because of "the discovery by the intending purchaser that the [vendor] had verbally agreed that his tenant under the sub-lease should pay £145 per annum instead of £180 and his refusal to go back upon his verbal agreement"; (b) the vendor was unable or unwilling to carry out the provisional contract; (c) the agents were thereby prevented from earning their commission, and he awarded as damages the full amount of the commission to which the agents would have been entitled, had the purchase been completed at the price agreed upon. The vendor appealed:—

HELD: (i) breach of contract by the vendor had been established, but it did not follow that the damages recoverable was the amount of the commission or that it was only nominal.

(ii) the county court judge had failed to consider whether the loss of commission was caused by the vendor's wrongful withdrawal of the agents' authority, and the risk there was that the vendor and the proposed purchasers might never have come to an agreement on the several matters requiring to be settled before there could be a concluded contract.

(iii) to entitle an agent to an award of damages equal to the amount of the commission, there must be a finding of fact that negotiations had reached such a stage that, but for the refusal of the vendor, completion would have taken place.

[EDITORIAL NOTE.] In the case of *Geo. Trollope & Sons v. Martyn Bros.* (1) the sale was not repudiated until contracts were ready to be exchanged. In the present case the repudiation, if any, occurred at the very outset of the negotiations, when the only term that had been settled was the price of the property. In the former case it may be reasonably assumed that, but for the repudiation, the purchase would have been completed, but in the latter case, especially where the property is leasehold and the purchaser has not yet inspected or received a copy of the lease, it may very well be that some other difficulty or difficulties would have intervened to prevent the exchange of contracts.

AD TO RIGHTS OF AGENT UPON REPUDIATION BY VENDOR, see HALSBURY, Hailsham Edn., Vol. 1, pp. 261, 262, para. 435, and FOR CASES, see DIGEST, Vol. 1, pp. 508-512, Nos. 1753-1769.]

Cases referred to :

- (1) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436 ; Digest Supp
- (2) *Prickett v. Badger* (1856), 1 C.B.N.S. 296 ; 1 Digest 509, 1754.
- (3) *Fisher v. Drewett* (1878), 39 L.T. 253 ; 1 Digest 510, 1759.
- (4) *Inchbald v. Western Neilgherry Coffee, Tea, & Cinchona Plantation Co. Ltd.* (1864), 17 C.B.N.S. 733 ; 1 Digest 542, 1952.
- (5) *Cutter v. Powell* (1795), 6 Term Rep. 320, 2 Sm. L.C. 4th Ed. 16 ; 12 Digest 116, 759.
- (6) *Nosotti v. Auerbach* (1899), 15 T.L.R. 140 ; 1 Digest 512, 1768.
- (7) *Grogan v. Smith* (1890), 7 T.L.R. 132 ; 1 Digest 515, 1784.
- (8) *Roberts v. Barnard* (1884), 1 Cab. & El. 336 ; 1 Digest 512, 1769.

APPEAL by Dr. Samuel Caplan from a decision of His Honour JUDGE HARGREAVES given at West London (Brompton) County Court on Feb. 21, 1936. The facts are fully set out in the judgment.

W. Arthian Davies (*Constantine Gallop* with him) for the appellant : It is clear from the evidence that it was the proposed purchasers who refused to go on with the transaction. It cannot be said that the appellant refused to go on or that the innocent misdescription at the beginning was a wrongful prevention by him of the earning of commission by the agents. The agents had not brought the parties into agreement on all terms, and they are therefore not entitled to commission (*George Trollope & Sons v. Martyn Bros.* (1) ; *Grogan v. Smith* (7)).

S. R. Edgedale for the respondents : The effect of the learned judge's finding that the negotiations came to an end on the discovery of the verbal agreement under which the tenant under the sub-lease paid £145 instead of £180 per annum, and that the appellant refused to go back on his verbal agreement is that the appellant refused to go on unless the prospective purchasers were prepared to accept the tenant at a reduced rent. If there was evidence on which the learned judge could find as he did, the Court of Appeal would not interfere with the decision. The agents found a purchaser who would have completed on any reasonable terms, but the transaction went off because the appellant wrongfully refused to go on. There is evidence on which the learned judge could find that if the appellant had not taken up the attitude he did, the transaction would have gone through. It was because of the appellant's wrongful withdrawal that the agents lost their commission.

[He referred to *Prickett v. Badger* (2), *Fisher v. Drewett* (3), *Nosotti v. Auerbach* (6), and *Roberts v. Barnard* (8).]

GREER, L.J. : The appellant, Dr. Caplan, in Mar., 1935, instructed the respondents, Messrs. Trollope & Sons, to act as his agents in selling certain property, of which he was the leasehold owner, known as 318, Uxbridge Road, Shepherds Bush. In a letter to the respondents, dated Mar. 13, 1935, he described the property as follows :

318, Uxbridge Road, Shepherds Bush. D.F. shop with rear entrance and side

door to upper part. Acccin. Large shop and room at rear and basement occupied for past seven years by Ashmore's Opticians. New leases 3-7, 14-21 years granted last year at £180 p.a. excl. [and other specified rooms occupied on the other floors]. Lease 99 years from Apr., 1883, i.e., 46 years unexpired at 14 guineas ground rent. Price £2,000 or near offer.

On receipt of that letter the respondents set about the work of trying to obtain an offer of £2,000 for the property. After arranging for an order to view, the respondents, through Messrs. White, Druce & Brown, obtained an offer of £1,500 on behalf of Small Properties, Ltd., for whom Messrs. White, Druce & Brown were acting. The offer was £1,500 "subject to contract." According to the uncontradicted evidence of Mr. Reckett, who was doing the work for the respondents, on Mar. 28 he had a conversation on the telephone with the appellant, when the appellant refused to accept the £1,500 offer, and said that if the respondents could get an offer of £1,750 he would accept that. Small Properties, Ltd., then agreed with Mr. Reckett to increase their offer to £1,750. This offer, like the previous offer of £1,500, was by implication an offer "subject to contract." The offer which the appellant had given the respondents authority to accept was an offer of £1,750 as the price for property of which the most valuable part, the ground floor and basement, was producing a rent of £180 per annum. Early on the morning of Mar. 29 Mr. Reckett made a note of a telephone conversation, in which the appellant said the rent should have been given as £145 per annum and not £180 per annum. The memorandum is as follows :

318, Uxbridge Road. Dr. Caplan telephoned on receipt of our letter of 28th instant to say we had made a mistake in his instructions and that the rent of the shop should have been given as £145 per annum as was stated in his letter of the 13th instant. I replied so far as I could recollect this was not the case and that I would have the letter turned up, but meanwhile that I would speak to the purchasers' agents and see what they were prepared to do. I told him that no doubt they would require a proportionate reduction as the income was £35 per annum less than had been given to them. Dr. Caplan does not seem inclined to make any reduction.

Later on the same day the respondents wrote to the appellant the letter of Mar. 29, which reads as follows :

318, Uxbridge Road, Shepherds Bush. Since you informed us on the telephone this morning that we had made an error in the particulars of the above, which you gave us in your letter of 13th inst., we have referred to this letter and find that the rent of the shop and basement is distinctly stated at £180 per annum exclusive, and no mention whatever made of there having been a reduction to £145. We have spoken to the purchasers' valuers, and as we anticipated, their clients are not prepared to proceed at the agreed price of £1,750, in view of the fact that the income is £35 per annum less than they were informed, unless a proportionate reduction which they compute at about £375 is made. We shall be glad to hear what you

wish us to do in the matter, and would mention we consider that in any event we should be entitled to our remuneration.

On the next day, Mar. 30, the appellant wrote to the respondents a letter which reads as follows :

I regret I am unable to accept the figure offered by your clients for the above property. I regret also if I omitted to mention that this rent was £145 and not £180 as given in the lease, although I presume I mentioned it to you on the 'phone, if not in my letter. The terms given in the lease are, of course, binding on the tenant, but I agreed verbally to a temporary reduction in the rent for an undefined period and would not wish to take advantage of the strict terms of the lease to effect a sale. If your clients care to proceed under these circumstances the matter can go ahead.

It seems clear from this that the appellant, though he still wanted to sell the property, withdrew the authority which he had given to the respondents to sell the property in question as a property earning as to part £180 per annum. On Apr. 2 the respondents wrote the letter which reads as follows :

We regret to say that under the altered conditions [the proposing purchasers] are not prepared to proceed at £1,750. They say that if the tenant of the shop has been promised a reduction in rent, there would no doubt be a lot of unpleasantness with him, which they do not want to be bothered with and he would in all probability give up the premises at the first break in the lease. The only particulars you gave us regarding the tenancies were contained in your letter of 13th ultimo, where, as we mentioned before, the rent for the shop was stated to be £180.

It is clear that the appellant by refusing to allow the transaction to go through except on the basis that the rent to the tenant should be reduced to £145 per annum, deprived the respondents of the chance that the work they had done would result in the sale of the property at the agreed figure of £1,750. I think that at this time the respondents had done all the work which is expected from an agent, though their work, having regard to the offer being "subject to contract" might not have resulted in a sale which would have entitled them to their commission. In my judgment this was a breach of an implied term in the contract under which the respondents were employed to obtain a purchaser of the property at the agreed price on terms which would be agreed between the appellant and the proposed purchaser. The respondents had done all the work which an agent for the sale of property instructed to find a purchaser had to do, though their commission would only become payable if the work that they had done should ultimately result in a concluded agreement between vendor and purchaser. Though the contract would not prevent the appellant from trying to obtain a purchaser himself either through other agents, or directly, still, as long as the property was in the market for sale the respondents ought not

to have had taken from them the chance of their services resulting in an agreement between vendor and purchaser which would have entitled them to commission. To use the words of MAUGHAM, L.J., in *George Trollope & Sons v. Martyn Brothers* (1) at p. 459, the appellant "was not at liberty to prevent the commission being earned." In that case all the relevant cases were discussed in my own judgment and in the judgment of MAUGHAM, L.J., I do not think it would serve any useful purpose to go through them again. I think it is established by *Prickett v. Badger* (2), *Fisher v. Drewett* (3), and *Inchbald v. Western Neilgherry Coffee, etc., Co.* (4), that such a term ought to be implied in the contract between the instructing principal and an agent employed to obtain a purchaser, and that such prevention will give rise to a right of action for damages for breach of the agency contract, even though there are still many terms of the contract between vendor and purchaser to be agreed to before the commission, *qua* commission, would become due to the agent.

In *Prickett v. Badger* (2) the agent acting on the instructions of the defendant had obtained an offer of £700 per acre for some freehold land in Seven Sisters Road, Holloway, Middlesex, which was £50 more than the price at which he had been authorised to sell. It was held that the agent was entitled to recover on a *quantum meruit* for the services rendered. By the judgment of a very strong court the agent was entitled to recover £50, the amount of the jury's verdict as a *quantum meruit*. In giving judgment, WILLIAMS, J., at page 304, said :

I think there was evidence which was fit for the consideration of the jury, that the defendant employed the plaintiff to sell the land, upon the terms, that, if he found a purchaser at the price named, he was to receive a commission of 1½ per cent.; and that the plaintiff bestowed his labour in endeavouring to find, and did find, a purchaser at that price; but that the negotiation failed because the defendant was not prepared to come forward as vendor; and that so the plaintiff was prevented from earning the stipulated commission.

It is clear that in that case, as in the present case, the commission was not earned because as between vendor and purchaser terms in addition to the price would have had to be settled between vendor and purchaser before the commission would become due, but the plaintiff, having done all the agency work, the defendant was held liable. CROWDER, J., in the course of his judgment, at p. 306, adopts the following statement of the law contained in the notes of the learned editor on the case of *Cutter v. Powell* (5), at p. 16 :

It is an invariably true proposition that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so,

immediately sue on a *quantum meruit* for anything which he had done under it previously to the rescission.

This, of course, can only be on the ground that the act of the defendant is a repudiation of an essential term in the contract between him and the agent. And in the conclusion of his judgment, CROWDER, J., says this, at p. 307 :

I agree with my brother WILLIAMS that the ordinary rule as to employing an agent to let or to sell for a certain commission, where the authority is revoked before anything has been done under it, does not apply to the present case.

This means, in the opinion of the learned judge, that if services had been rendered by the agent before the authority was revoked, then the agent could recover either damages, or a *quantum meruit* for work done. WILLES, J., agreed with the other two judges, saying in the course of his judgment, at p. 307 :

In pursuance of the retainer, he proceeded to find a purchaser for the land ; and it was only the defendant's disinclination or inability to proceed that prevented the sale being completed.

Later in his judgment he says :

I must confess I do not see why the jury should not have given him the full amount.

Fisher v. Drewett (3) was an action by an agent for commission for procuring a loan on mortgage. The commission note was in these terms :

Dear Sir—In the event of your procuring me the sum of £2,000, or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received.

The plaintiff went to various solicitors' offices attempting to procure the loan, and ultimately entered into an arrangement with the Temperance Building Society, who agreed to advance such a sum as their surveyor should certify. The survey was made, and the sum certified was £1,625. The society thereupon offered to advance that sum to the defendant, subject to his title to the property being satisfactory, and he wrote to their secretary accepting the society's offer. Subsequently when the title was being investigated by the society's solicitors, the defendant refused, on the ground of expense, to furnish a further abstract of title, and consequently the loan was never made. Though the various terms applicable to the mortgage had not been finally agreed, the court held that the plaintiff was entitled to the amount of his commission. THESIGER, L.J., in giving his judgment, said at p. 254 :

It was the defendant's fault that the loan was not completed, and he would have been liable to an action for not carrying out his agreement.

I understand that the learned Lord Justice meant that the defendant

would have been liable to an action by the plaintiff for not carrying out his agreement with the plaintiff.

In *Inchbald v. Western Neilgherry Coffee, etc., Co.* (4) the material facts of the case are stated by me in my judgment in *George Trollope & Sons v. Martyn Brothers* (1), at p. 448, in the following words :

The contract there was to pay to the plaintiff, who was employed as a stockbroker in and about the selling and disposing of the shares of the company, the sum of £100 down and £400 in addition on the allotment of the whole of the shares of the company. The defendants, who had prevented, by winding up the company, the allotment of the whole of the shares, were held liable for damages because by causing the winding up they had prevented the allotment, and the damages were fixed at £250.

In the course of his judgment WILLES, J., says, at p. 741 :

I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it.

This observation is, perhaps, too widely stated, but in so far as it states an obligation not to do any act which prevents the person entitled to receive the money from receiving it, it accords with the law as laid down in other cases—such, for example, as *Fisher v. Drewett* (3). In the case we are considering, I think it was established that the defendant had broken his contract with the plaintiffs. But it does not follow that the damage recoverable is the amount of the commission or that it is only nominal.

The learned county court judge who tried this case gave judgment on the alternative claim made by the respondents for damages for breach of contract, and he awarded as such damages the full amount of the commission. In order to succeed in recovering anything more than nominal damages the respondents would have had to prove not merely that the appellant had broken an implied term of the contract of employment, but they would have had to establish by sufficient evidence that by reason of the appellant's wrongful withdrawal of their authority to sell on the basis that the tenant's rent was £180 they had lost the amount of their commission. This means that there would have had to be evidence making it highly probable that if the appellant had allowed the transaction to go on all the terms would have been agreed and a contract would have been entered into between the appellant and the proposed purchasers at the agreed price. The only evidence on that question is that which was given by Mr. L. J. Ellis, the secretary of the proposed purchasers, Small Properties, Ltd., who said that his company would certainly have completed on any reasonable terms. The learned judge never directed his mind to the question whether the loss of the commission was caused by the appellant's wrongful withdrawal of the

respondents' authority. He did not consider the risk that there was that the appellant and the proposed purchasers might never have come to an agreement with regard to the several matters that have to be settled before there can be a concluded contract as between the vendor and the purchaser, including especially the date of completion, nor did he consider the risk of any disagreements that might arise between the time when the price was agreed and when the purchase would be concluded by the signing of a contract between vendor and purchaser. I think the learned judge was wrong in law in not considering the question whether the appellant's breach of contract caused the loss of the commission and there must be a new trial ordered on that ground. I note that the plaintiffs did not base their claim on the right to charge a *quantum meruit* for their time and labour, and I therefore exclude such a claim from my consideration.

As the appellant has had to come to this court to get the relief to which he thinks he is entitled by an order for a new trial, he ought to have the costs of the appeal; the costs of the first trial to abide the event of the new trial. There should also be liberty to apply in case the respondents should not set down the case in the county court for re-trial.

GREENE, L.J.: The plaintiffs are house agents and in this action they put forward two alternative claims, one for commission alleged to have been earned, the other for damages for breach of an implied term in the agency agreement with the defendant by wrongfully preventing the plaintiffs from earning their commission. The learned county court judge gave judgment for the plaintiffs on the latter claim, and it is upon that claim alone that the question in this appeal arises. The former claim was one which on the facts admittedly could not be supported, since it was not suggested before us that under the contract to be inferred between the parties the plaintiffs would have been entitled to commission at any stage before a contract for the sale had been actually made.

In order to explain the nature of the question, it is necessary to state the facts with some particularity. The defendant was the owner of leasehold premises, 318, Uxbridge Road, Shepherds Bush, held on a lease for ninety-nine years from Apr., 1883. Part of these premises was sub-let by a sub-lease granted in 1934 for a term of three, seven, fourteen or twenty-one years at tenant's option. The rent reserved by the sub-lease was £180. In Mar., 1935, the defendant placed this property in the hands of the plaintiffs for sale by private treaty. He gave them the particulars above-mentioned, together with others not material to be stated, in a letter of Mar. 13, 1935, in which he said that his price was £2,000 or near offer. Apart from the price the defendant did not inform the plaintiffs as to the terms which he would be willing to accept

in respect of title, date of completion and other matters which would require to be agreed with a purchaser before a binding contract could be effected. No express agreement was made as to the terms upon which the plaintiffs were to act on behalf of the defendant in the matter. The plaintiffs found a company named Small Properties, Ltd., which was willing to negotiate for the purchase of the property described, and on Mar. 27, 1935, they communicated to the defendant an offer by this company of £1,500 "subject to contract." This offer was refused by the defendant on Mar. 28, but he instructed the plaintiffs that if the company would increase its offer to £1,750 he would close with them. The plaintiffs communicated with the company which did increase its offer to £1,750, and the defendant was so informed by letter from the plaintiffs on Mar. 28. It is agreed that this increased offer was also "subject to contract." This means that at this stage neither the defendant nor the company was bound. The offer and its acceptance amounted to nothing more than an intimation by the parties of their willingness to enter into a contract at the price stated, provided both should remain willing to continue the negotiations and provided they could agree on the other terms to be inserted in a written contract. The position, therefore, at this stage was that the plaintiffs had only taken the first step towards earning their commission. No binding contract had been made, none of the terms of the proposed contract had been settled, except the price and both the vendor and the purchasers were entitled at any moment and for any reason, good or bad, to decline to go on with the negotiations. Incidentally, it is to be observed that at the time when the negotiations were broken off the purchasers had not even examined the lease. It is true that the plaintiffs had carried the matter to a point where it was ready to be put into the hands of the solicitors for the parties. But it was not possible for the plaintiffs to say that they had procured a purchaser ready and willing to purchase on the defendant's terms, since, apart from the price, no such terms had been stated and accordingly the company cannot be said to have agreed to terms. At this stage in the negotiations an important event happened. The defendant on Mar. 29 telephoned to the plaintiffs, informing them that they had made a mistake in his instructions and that the rent (i.e., the rent payable by the sublessee) should have been given as £145 per annum. On receipt of this information the plaintiffs communicated with the company's valuers, who stated that their clients were

not prepared to proceed at the agreed price of £1,750, in view of the fact that the income is £35 less than they were informed unless a proportionate reduction which they compute about £375 is made.

This decision was communicated to the defendant by the plaintiffs by letter of Mar. 29, and on Mar. 30 the defendant replied [His Lordship

read the letters of Mar. 30 and Apr. 2 set out above]. The negotiations then came to an end. The arrangement between the defendant and his sub-tenant was in fact not a binding one in law. It was merely an indulgence granted voluntarily by the defendant, which could have been discontinued at any time and did not affect the sub-tenant's legal liability to pay the full rent of £180.

The learned county court judge awarded to the plaintiffs as damages a sum equal to the commission which they would have earned if the contract had been actually made. His decision appears to be based on two findings, which I will state in their logical order, although that is not the order in which they appear in the note of his judgment. (1) He finds that :

every term of the proposed contract between the defendant and the proposed purchaser, Small Properties, Ltd., had been agreed upon "subject to contract."

He holds (2) that the negotiations came to an end because of

the discovery by the intending purchaser that the defendant had verbally agreed that his tenant under the sub-lease should pay £145 per annum instead of £180 and his refusal to go back upon his verbal agreement.

I will deal with the second of these findings first. I cannot myself read the defendant's letter of Mar. 30 in any sense other than as a refusal to proceed with the negotiations except upon the footing that the purchasers would accept towards the sub-tenant at least the same moral obligation as the defendant conceived himself to be under in respect of the reduction of the rent. I doubt whether it goes further than this. If the defendant in this letter was asking the purchasers to enter into a legal obligation towards the subtenant to agree to a reduced rent, he would have been asking the purchasers to place the sub-tenant in a better position than he was then, since the reduction which he was enjoying was a mere matter of indulgence. The purchasers themselves do not appear to have construed the defendant's proposal as specifically asking them to enter into an obligation, legal or moral, towards the sub-tenant. Their objection was that the existence of the understanding between the defendant and the sub-tenant placed them in the dilemma, either of having to accept a reduced rent, or, if they insisted on the full rent (which they apparently conceived they would be entitled to do if they completed) of having a dissatisfied tenant who would in all probability determine his tenancy at the earliest possible moment. That this was their understanding of the defendant's proposal appears, I think, from the correspondence (particularly the letter of Apr. 2) and from the evidence of Mr. Ellis, the purchasers' secretary, who said "Our reason for not completing was that we like to have satisfied tenants. The tenant would have been most dissatisfied. We did not want to buy

trouble." It was argued that the defendant was not asking the purchasers to enter into any sort of obligation and that he was willing that the purchase should go through on the basis that the purchasers might, if they chose, exact the full rent; and that the real reason why the negotiations were broken off was that although the purchasers would have had a legal right to exact the full rent unfettered by any obligation, legal or moral, it was they who refused to proceed, because they were afraid of trouble with the sub-tenant. Some colour is lent to this argument by the evidence of Mr. Ellis, which I have quoted. But even if the purchasers misunderstood the vendor's requirement, I think on the whole that that requirement was the effective cause of the termination of the negotiations and that the learned county court judge was right in the second of his findings set out above, subject only to this, that, if by the expression "verbally agreed" he means that there was a legal binding agreement he was admittedly mistaken, a circumstance which however would not affect the substantial correctness of his finding upon the material point. But this is not, in my opinion, sufficient to entitle the plaintiffs to recover as damages an amount equal to the commission. It is, I think, clear from the learned judge's note of his judgment that the first finding was in his opinion essential to his decision. Indeed, the finding is so worded as to bring the case within the principle of the decision of this court in *George Trollope & Sons v. Martyn Brothers* (1), which was cited to him. This finding cannot in my opinion be supported, since there is no evidence whatever that any terms had been agreed other than the price. In order to support a claim for damages equal to the commission, it was in my judgment necessary for the plaintiffs to establish at least that but for the action of the defendant in refusing to proceed except upon the basis mentioned in his letter of Mar. 30, a binding contract would have been made, with the result that the plaintiffs would have earned their commission. In *George Trollope & Sons v. Martyn Brothers* (1) the plaintiffs were able to establish this to the satisfaction of the trial judge, since every term of the contract had been agreed and the engrossment had been actually executed by the purchaser. It was therefore a reasonable inference for the court to draw in that case that but for the action of the vendor the contract would have gone through. The facts of this case are very different.

The learned county court judge further finds that the plaintiffs had carried out everything that they undertook to do. This does not mean that they had become entitled to their commission, nor does the learned judge so hold. What I think it means is that as the only term which the defendant had communicated to the plaintiffs was the price, all they could do was to find a purchaser willing to negotiate the terms of a contract at the agreed price, the negotiations from that time forward being a matter with regard to which there was nothing for them to do.

But this is, of course, far from saying that they were entitled to their commission. When an intending vendor instructs a house agent to sell his property, merely informing him of the price, the agent knows perfectly well that there will probably be many other terms in respect of which the parties must come to an agreement before the contract can be made which is to entitle him to his commission. He knows further that the negotiations may break down for a variety of reasons, such as unwillingness of the purchaser to proceed or failure to agree on some terms in regard to which both parties acting quite reasonably may take different views. The learned county court judge, if I understand him rightly, proceeds to hold that where the agent has done everything he can to earn the commission (using that expression in the sense which I have indicated), if the vendor withdraws from the negotiations without reasonable excuse he will be liable to pay the agent's commission, by which I think he means not commission as such, but damages for preventing the agent from earning his commission, the measure of damages being the full amount of the commission. I am unable to accept this as a correct statement of the law. It is not the circumstances that the agents have done everything they could to earn their commission, coupled with a withdrawal by the principal without reasonable cause that justifies an award of damages equal to the commission. Before such an award can properly be made, it must in my opinion be found as a fact that but for the action of the principal a binding contract would have been made which is quite a different thing. It does not in the least follow from the fact that the agent has done everything he can do that a binding contract will be made. Nor does it follow from the fact that the withdrawal of the vendor at that stage was an arbitrary one that but for such withdrawal a binding contract would have been made. It is in my judgment a question of fact in each case whether or not the contract would have been made if it had not been for the vendor's action, and to this question the learned county court judge does not appear to have directed his mind; or at least if he did direct his mind to it, it was on the hypothesis (which I have already shown was incorrect) that all the terms of the proposed contract had been agreed.

It was argued that it would not be open to a court to find that a contract would have been made except in a case where the negotiations had at least reached a stage where the parties were in agreement as to all the terms of the proposed contract as was the case in *George Trollope & Sons v. Martyn Brothers* (1). This in my opinion is incorrect, and I cannot read that case as authority for so extreme a view. The stage which the negotiations have reached in any particular case is obviously a circumstance of the greatest importance to be considered in answering what I think is the real question of fact. But I cannot agree that as a matter of law the question must necessarily be answered adversely to the agent

unless the negotiations have reached a stage so advanced as that suggested. The less advanced the negotiations are the more difficult it will be for the agents to establish their claim for damages equal to the commission ; but even if the negotiations have only reached the stage of agreement upon one term, there may yet be special circumstances in the case sufficient to justify a tribunal of fact in drawing the inference that but for the vendor's action the parties would have made a contract. It is for the tribunal of fact to weigh all the circumstances, in particular, the terms which have been agreed, those which still remain to be agreed, the possibility of the parties failing to agree upon these latter terms, the possibility of the purchaser withdrawing for any reason good or bad and (in the present case) the fact that the purchasers had not inspected the lease.

Having regard to what I have said as to the importance attached by the learned county court judge to the fact that the plaintiffs had done all that they could do, it is right that I should add a few observations upon a passage in the judgment of GREER, L.J., in *George Trollope & Sons v. Martyn Brothers* (1), on which the view of the learned county court judge appears to be based. GREER, L.J., said this, at p. 451 :

But as between the plaintiffs and the defendants, the latter could not after the plaintiffs' work was complete deprive them of the fruits of their work by withdrawing their consent to the signing of the contract and the completion of the sale.

A similar passage occurs on p. 452. In the passage which I have quoted, GREER, L.J., clearly treats as an essential fact to be found before the plaintiffs could be awarded the damages which they claimed that the defendants' action had deprived the plaintiffs of the fruits of their work. Now this fact had been found by the learned trial judge, and it is in relation to that finding (which was accepted by the court) that the passage quoted must be read. The reference to the circumstance that the plaintiffs had completed their work does not, as I read the passage, mean that it was this circumstance that entitled the plaintiffs to recover the damages awarded ; it was the deprivation operating on that circumstance which was the crucial matter. In other words, the plaintiffs would not have been entitled to the damages awarded unless they could show : (1) as on the facts of that case and on the true construction of the agreement under which the plaintiffs were employed they did show, that they had completed their work ; and (2) that it was the defendants' withdrawal that prevented the matter being completed by a contract. Upon the facts of the present case the plaintiffs had in my judgment completed their work in the sense of that expression, as used by GREER, L.J. But as I have already pointed out, before they can recover damages equal to the commission, it must be proved as a fact that the defendant's action deprived the plaintiffs of the fruits of that work, a

thing which is not proved merely by saying that the defendant arbitrarily withdrew. If all the plaintiffs in the present case could show was that the defendant had wrongfully deprived them of the chance of earning their commission, as distinct from preventing them from earning commission which but for the defendant's action they would have earned, some damages could, I think, be awarded, since it appears to me on the authorities that the implied undertaking in contracts of this nature covers the case where the principal without just excuse does something which deprives the agents of the chance of earning the commission, at any rate where the agents have rendered services under their contract with the principal. But the measure of damages to be awarded in such a case must depend on the value of the chance of earning the commission and that value may be great or small or nominal according to the circumstances.

In conclusion I may perhaps be allowed to say that in my judgment the authorities as to the rights and obligations of house agents and their clients with regard to such questions as the present one are not in a very satisfactory condition, and to express the hope that one day the whole position may be reviewed by the House of Lords.

In the result I agree with the order proposed by GREER, L.J.

TALBOT, J. : I think in this case that the county court judge must be taken to have found that : (1) the purchase went off because the defendant refused to proceed with it unless Small Properties, Ltd., would pay a price of £1,750 ; (2) Small Properties, Ltd., had provisionally agreed to pay £1,750 on the footing that the occupying tenant of the premises was bound to pay, and was paying, £180 rent ; (3) before Mar. 29, 1935, Small Properties, Ltd., knew nothing of any understanding between the defendant and the said tenant that the rent paid was to be £145 ; (4) before the same day the defendant had not informed the plaintiffs of any arrangement (legally binding or not) for any rent, except £180. Small Properties, Ltd., would not give £1,750 unless they could expect to receive £180 rent from the sitting tenant for the rest of his term without question or complaint. The defendant would not accept less than £1,750, though that price had been proposed to, and provisionally agreed by, Small Properties, Ltd., without any knowledge of an arrangement between the defendant and his tenant that the rent paid would for a time be substantially less than the sum (£180) mentioned in the lease. In other words, the defendant put an end to the negotiations by introducing a new term, never disclosed to Small Properties, Ltd., when they provisionally agreed to pay £1,750. When it turned out that the defendant would sell only if Small Properties, Ltd., would undertake not to require the tenant to pay more than £145, Small Properties, Ltd., naturally and reasonably required a proportionate

reduction in the price. By refusing this the defendant destroyed any chance that the transaction might go through. In my opinion the plaintiffs are in these circumstances, entitled to recover damages (certainly not necessarily nominal) for breach of contract by the defendant in so altering his instructions to them by the introduction of a new term to which it was unreasonable to expect the party, with whom negotiation had proceeded to a promising point, to agree, and thereby making it impossible for the plaintiffs to earn their commission. *Nosotti v. Auerbach* (6), in my opinion, helps the plaintiffs on the effect of the introduction by a vendor of a new term in a case of this kind: see per MAUGHAM, L.J., in *George Trollope & Sons v. Martyn Brothers* (1). I agree with the order proposed.

Appeal allowed. Order for new trial.

Solicitors: *Forsyte, Kerman & Phillips* (for the appellant); *Trollope, Winckworth, Crump & Sprott* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]



